Dependent Advocacy: Alternatives to Independence Between Attorneys

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I. INTRODUCTION

Independence between advocates is a bedrock principle of the legal profession. The fact that "independence" is woven into the welcome mat for legal services is seen any time an unrepresented party is advised to seek "independent counsel." Though legal ethical rules are designed to preclude relationships between opposing advocates, the need to protect independence has never been questioned and alternatives have never been proposed.

But what if strong, dependent relationships between opposing advocates were fostered in certain situations? Consider small-town litigators who, because they work across from each other on a continuing basis, are adept at resolving cases amicably. With rises in population and urbanization, this bygone attorney archetype is being replaced by big-city attorneys who are less likely to work across from each other on multiple cases. It is well established that a working relationship between opposing parties tends to foster cooperation, trust, rapport, and creative outcomes. In fact, the perceived decline in professionalism among attorneys in the last 50 years may be linked to, if not entirely caused by, this shift in the legal landscape. These observations call into question the dogma of absolute independence between opposing attorneys.

However, the presumptive need for independence is most vulnerable between non-legal advocates. Negotiation-focused advocates such as collaborative lawyers perform many of the same functions as litigators but, importantly, do not seek legal intervention. Should these non-legal advocates be governed by the same ethical schemes as courtroom attorneys?

By exploring the reasons underlying ethical rules concerning independence, this paper will identify the conditions in which independence is necessary and, conversely, when independence between opposing advocates is optional or even counterproductive. Part I provides a background to this inquiry by showing that the application of binding law in an adversarial, decision-based forum necessitates that attorneys operate independently of each other. The strong link between independence and litigation calls into question the need for independence between advocates who operate solely in the context of negotiation and thereby outside the adversarial courtroom. Part II follows this realization with an analysis that applies game theory to the history of the American legal system to demonstrate that independence is crucial to advocacy inside the courtroom but may be detrimental to advocacy in other contexts. With the prior two sections delineating the appropriate contexts for independence between opposing advocates, Part III proposes "dependent advocacy" as a relationship among advocates that may be more conducive to negotiation and collegiality. Though independent advocates

retain the valuable function of advising clients of their legal rights and may continue to be preferred by some disputants, people seeking the assistance of an advocate currently only have the option of independent advocates and may benefit from another option. The most basic application of dependent advocacy is the negotiation-based advocate, already present in alternative dispute resolution processes such as co-resolution and collaborative law. However, by applying the principles of dependent advocacy, this article concludes by proposing a method for attorneys to replicate the collegiality observed in small-town legal practice by offering services as part of organized legal practice groups with limited numbers of opposing counsel.

In challenging the requirement that advocates in every context operate independently, this article will explore the specific conditions that require independence and the effects of relationships on interactions between opposing advocates. Digging at the foundations of independent counsel will unearth unique insights into the relationship between attorney loyalty and the heterogeneous nature of the society that is enforcing its collective will with binding laws, how the ethical requirements of professionals other than attorneys are affected by their relationship to binding law, the ideal game theory relationship between opposing advocates in the context of litigation as compared to negotiation, and also the decline in professionalism among attorneys and how this trend could be reversed.

The overall goal of this analysis is to offer another form of advocacy alongside independent attorneys. In one ideal application of these ideas, disputants will be able to frame their disagreements within the bounds of the law by using independent counsel to evaluate their situations but would then be able to negotiate their particular interests using advocates that are better suited for cooperation. In the other application of dependent advocacy, legal advocates alter their relationship to incentivize an amicable approach to litigation. Both applications create new options for disputants and additional services for dispute resolution professionals to expand and better apply their services.

II. THE NEED FOR INDEPENDENCE BETWEEN ATTORNEYS

All of the integral aspects of legal advocacy require that advocates operate independently. In their function as advisors over binding rules and procedures that carry the force of the collective society, legal advocates must support the client, independent of any conflicting loyalties.[1] Because the utility of binding law as a method of resolving disputes lies in unilateral action against an unwilling party, professionals applying these laws must act separately.[2] And

[1] *See infra* Section I.A.
[2] *See infra* Section I.B.

the adversarial procedures applied in this system require a zealousness that is facilitated by complete independence between legal advocates.[3] Thus, independence is built into the role of legal advocates because of their function in the process of litigating binding law.

However, attorneys do not always operate as litigators. While knowledge of legal rights is important to navigating clients through their dispute, attorneys often resolve cases through informal negotiation rather than adjudication in front of a powerful third-party.[4] In fact, the emergence of collaborative law clearly demonstrates that advocacy is useful without even a possibility of entering the courtroom. If independence between advocates is specifically designed to address the application of binding law in an adversarial adjudicatory process, is such independence necessary when advocacy is limited to voluntary, informal negotiation among the parties? Before this question is addressed, the direct link between litigation and independence will be explored to detail in order to explain when and why independence is necessary between advocates.

A. *Binding Law Requires Loyalty Through Independence*

First, attorneys are distinct from other professionals in that their expertise is in a system of rules that society has collectively determined to be inescapable and binding. In order to counsel clients regarding the forcible deprivation of their property and freedom, legal advocates must act with unhindered loyalty. As will be demonstrated below, ethical rules that regulate professionals in the context of these binding deprivations ensure loyalty by requiring the professionals to act independently. This section will therefore show that independence between professionals is a product of working within a system of binding rules and, conversely, that working outside of a system of binding rules should not require independence.

Beginning the analysis broadly, the legal system is a network of procedures and sanctions enforcing the norms that society as a whole has designated to be binding.[5] Acting by proxy, the government channels the

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[3] *See infra* Section I.C.

[4] *See generally* Abraham L. Wickelgren, *Law of Economics and Settlement, in* RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS (ed. Jennifer Arlen, 2015) (describing settlement rates in tort cases); Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 115 (2009).

[5] Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U.L. REV. 781, 787 (1989) (citing John Rawls' seminal definition of a legal system, stating that a "legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation"); ANTHONY

collective will of society to create broadly applicable laws and resolve individual disputes.[6] Because the legal system exercises the power of the entire society against individuals,[7] the judiciary is a fallible, human institution[8] that wields an incredible amount of coercive power.[9]

D'AMATO, HOW TO UNDERSTAND THE LAW (1989), at 1 (defining the function of law as "artificial mechanism designed to channel human behavior into directions society wants"); JOHN RAWLS, A THEORY OF JUSTICE 235 (1971) (describing the legal system as a system of rules intended to promote cooperation while regulating conduct); Gregory C. Keating, *Fidelity to Pre-Existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1, 4 (1993) (asserting that law defines rights and duties and governs expectations); Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U.J. INT'L L. & POL. 679, 688 (1999); (quoting the definition of a legal order as "a system of norms binding on determined subjects which trigger some pre-established consequences when the subjects breach their obligations."); Laura Nader, *A Comparative Perspective on Legal Evolution, Revolution, and Devolution*, 81 MICH. L. REV. 993, 998 (1983) ("Traditionally, law has been conceived as the property of a society as a whole. As a logical consequence, a given society was thought to have only one legal system that controlled the behavior of all its members.")

[6] Deborah M. Hussey Freeland, *What Is A Lawyer? A Reconstruction of the Lawyer as an Officer of the Court*, 31 ST. LOUIS U. PUB. L. REV. 425, 447 (2012) ("The legislative machine weaves the social fabric on a grand scale, through the collaboration of lawmakers who represent the collective public (and who are lobbied by representatives from specific groups)"); James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 202-03 (1990) ("[S]ociety's members, also known as 'the people,' generally find it advantageous to create a government to handle the chores associated with collective self-rule.... The government, Locke argues, is thus no more than an agent of the people.").

[7] Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 87 (2002) ("[P]ublic law speaks authoritatively for the entire society, binding all who are subject to it."); Leon R. Yankwich, *The Art of Being a Judge*, 105 U. PA. L. REV. 374, 375 (1957) ("Pound's definition of law is: 'social control through the orderly and systematic application of the force of politically organized society'...What gives strength to law is the fact that through it is expressed the desire of the community to regulate and control certain activities and relations....As society developed, it became necessary to formulate some of these customs, rules and regulations into a code of laws having behind it the sanction and force of the *whole community*.") (emphasis added).

[8] Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 25 (2005) (noting that "the proper use of retribution is far from guaranteed in a legal system run by fallible human beings."); Charles I. Lugosi, *The Rejection of Divine Law in American Jurisprudence: The Ten Commandments, Trivia, and the Stars and Stripes*, 83 U. DET. MERCY L. REV. 641, 669 (2006) (discussing the tension "between God's infallible divine laws that give shape to natural law that is imbued with justice, and fallible human made law, that artificially erects a parallel legal system that is often prone to injustice.").

[9] Matthew D. Friedlander, *Adjudicating in the Kingdom of Ends: A Constructivist Response to the Hart/Dworkin Debate*, 2011 U. ILL. L. REV. 1387, 1388 (2011) ("In a legal

The courts that compose the judiciary then admit certain professionals—based on expert knowledge of the binding rules and procedures[10]—to be privately retained by individuals to assist in the management of their cases.[11] By advising their clients about rights and obligations, such experts exercise the authority of the state as it forces behavior that would not otherwise occur.[12] Though it may be argued, philosophically, that law is made binding not by the powerful state but rather by underlying morality[13] or by the tendency of people to comply with these written rules, [14] these considerations would be unimportant to the people who hire professionals to address the forcible deprivation of their property or freedom. The considerable power handled by these experts on binding authority should therefore distinguish them from other experts.

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system that places an enormous amount of power in the judiciary, questions concerning the proper role of the judge are paramount.").

[10] Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 708 (1977) ("[T]he Code supports the necessity for lawyers by pointing to the 'complex nature of our legal system' and emphasizing the desirability of a 'personal relationship' with someone having 'a disciplined, analytic approach to legal problems, and a firm ethical commitment.'").

[11] Hussey Freeland, *supra* note 6, at 445 ("The state channels formidable power to the court to fulfill its charge of applying the law and ruling justly. The court, in turn, appoints lawyers to represent parties (inter alia): to manifest properly private persons whose interests are to appear for judgment.").

[12] Michael Torrance, *Persuasive Authority Beyond the State: A Theoretical Analysis of Transnational Corporate Social Responsibility Norms as Legal Reasons Within Positive Legal Systems*, 12 GERMAN L.J. 1573, 1586 (2011) ("The 'authoritative' expertise of these norm generators becomes embedded in the rules and norms themselves, which in turn become institutionalized through the constraints they impose on their norm-subjects, including even public policy makers. Such epistemological authorities...exercise more than simply expert judgment in the provision of advice, and may also act as an evaluator of conduct.... In this way, these experts are able to constrain behaviors and exert significant pressure on actors within their systems.").

[13] Lon L. Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 HARV. L. REV. 630, 632 (1958) (promoting a natural law philosophy in which morality is the source of law's binding power and arguing that "[l]aw, as something deserving loyalty, must represent a human achievement; it cannot be a simple fiat of power or a repetitive pattern discernible in the behavior of state officials.").

[14] Torrance, *supra* note 12, at 1547. ("[T]he most salient question in determining legal relevance is whether norms are actually obeyed in practice."); Radin, *supra* note 5 at 782-83 (pointing to the "conception of rules, commonly attributed to Wittgenstein, which holds that rules can only be claimed to exist when there is community agreement in practice. To put this conception roughly, agreement in action does not follow from there being a pre-existing rule; agreement in action is the only basis for claiming that there is a rule."); *Id.* at 797 (questioning "how we should understand the notion that rules are 'binding.' In what consists the 'binding-ness' of rules? The skeptic says, 'This bond cannot be shown.'").

While doctors are entrusted with their patients' lives and psychologists are entrusted with their clients' deepest secrets, legal professionals are unique in that they assist one individual who is faced with the collective power of society embodied in the state. The clash between individual rights and such social regulation forges a unique relationship between legal professional and client.[15] Serving one person against the collective whole demands a key virtue from legal professionals: loyalty.[16] For a variety of reasons described below, working in a system of rules that bind and potentially coerce the client demands an elevated duty of loyalty from the professional.

Ranging from the philosophical to the practical, the reasons for legal professionals to offer an elevated duty of loyalty to their clients are rooted in the binding nature of law. The philosophical reasons for such loyalty relate to fairness of the judicial system and the value of individual autonomy. In order to enforce societal norms on all individuals in a heterogeneous society, the judiciary must appear to be fair to all[17] and achieves this image with attorneys who operate independently of this system[18] and with overriding loyalty to their

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[15] Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1077 (1976) ("The [lawyer-client] relation must exist in order to realize the client's rights against society, to preserve that measure of autonomy which social regulation must allow the individual.").

[16] Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, A Guilty Client, an Innocent Condemned Man, and an Ethics-Seeking Defense Counsel*, 29 LOY. L.A.L. REV. 1611, 1624 (1996) ("Thus, in the end, the lawyer's virtue—loyalty—is linked to the client's rights—autonomy and privacy.").

[17] Gerald P. Moran, *A Radical Theory of Jurisprudence: The "Decisionmaker" As the Source of Law—the Ohio Supreme Court's Adoption of the Spendthrift Trust Doctrine As A Model*, 30 AKRON L. REV. 393, 461 (1997) ("The judiciary, as an institution, is a natural outgrowth of the resulting difficulty of enforcing emerging national norms on both a heterogeneous and homogenous society. Thus, we have developed the judiciary as a necessary bureaucratic mechanism to exercise independent autonomy over the entire community. In light of this judicial process and the courts' direct 'exercise' of power, society must, in turn, believe that our legal system is fair and, like some fairy tale, equally applied to all. Indeed, society must believe, either consciously or subconsciously, that such a perfect mosaic of divine principles exists in order to ensure each individual's interdependent commitment to and acceptance of the community's norms.").

[18] Marc Feldman & Jay M. Feinman, *Legal Education: Its Cause and Cure*, 82 MICH. L. REV. 914, 924 (1984) ("How is it possible that lawyers could play this central role for such a socially diverse, politically contentious people? Only because they have claimed to be above the fray throughout history."); Eleanor W. Myers, *Examining Independence and Loyalty*, 72 TEMP. L. REV. 857, 862 (1999) ("This aspect of independence is the freedom to pursue client interests free from coercive controls by the state. It is a prerequisite to serving the client with loyalty. If our legal system did not permit lawyers' independence from state imperatives, lawyers would not be free to advocate loyally on behalf of clients.").

clients.[19] As a result, the call for attorneys to focus their loyalties on clients and thereby oppose the powerful state is found in foundational legal theories,[20] U.S. Supreme Court rulings,[21] and in arguments on the morality of American legal ethics.[22] This link between the diversity of society and the philosophy of the justice system, which enforces a single set of binding rules on its members, is reflected in the focus on client loyalty of American attorneys as contrasted with the overriding loyalty to the justice system exercised by

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[19] Timothy J. Miller, *The Attorney's Duty to Reveal a Client's Intended Future Criminal Conduct*, 1984 DUKE L.J. 582, 594 (1984) ("A client who believes that his attorney's loyalties are divided between the client and society in general, may feel that society has an unfair edge."); Jason J. Kilborn, *Who's in Charge Here?: Putting Clients in Their Place*, 37 GA. L. REV. 1, 24 (2002) ("The primary objectives of law had migrated away from maintaining the purity and inviolability of the legal system; they now moved toward engaging the system to advance individual rights. In a society coming to grips with diversity of race, gender, culture, and economic condition, lawyers could no longer maintain their homogenous notion of 'the client' and her 'interests.'"); Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367, 377 (1992) ("Monroe Freedman's recent work suggests a Roycian loyalty to causes, upon which Freedman carefully constructs a theory of legal ethics. Freedman's causes are the adversary system and client dignity and autonomy under the law. Out of loyalty to these causes, Freedman develops a powerful duty of loyalty to the client.").

[20] In legal theory, from formal legal reasoning to late nineteenth-century classicism to atomistic legal reasoning to Lasswell-McDougal policy science, law and lawyers are seen as independent of society but useful to it. Throughout, the emphasis is on the process of lawmaking rather than its substantive effects on and its difference from other systems of social, political and ethical judgment. ROBERT BOCKING STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 131-133, 264-66 (1983).

[21] Polk County v. Dodson, 454 U.S. 312, 318- 19 (1981) ("In our system a defense lawyer characteristically opposes the designated representatives of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'").

[22] "Individuals have rights over and against the collectivity. The moral capital arising out of individuals' concrete situations is one way of expressing that structure of rights, or at least part of it. It is because the law must respect the rights of individuals that the law must also create and support the specific role of legal friend.... When I say the lawyer is his client's legal friend, I mean the lawyer makes his client's interests his own insofar as this is necessary to preserve and foster the client's autonomy within the law. This argument does not require us to assume that the law is hostile to the client's rights. All we need to assume is that even a system of law which is perfectly sensitive to personal rights would not work fairly unless the client could claim a professional's assistance in realizing that autonomy which the law recognizes." Fried, *supra* note 15, at 1073.

attorneys in more homogenous societies.[23] Thus, when society presses binding law against individual autonomy, considerations of fairness dictate that experts in such laws exercise loyalty that is proportionate to the diversity found in that society.

Furthermore, a system of binding laws poses a variety of practical reasons for its experts to promise undivided loyalty to clients. First, people with legal problems may act less on their understanding of the complicated structure of laws and procedures and more on a sense of fairness that is enhanced through the guidance of a loyal advocate.[24] Next, experts in law represent individuals against adverse interests in society and must thereby address morally ambiguous situations.[25] The simple ethic of loyalty to clients thereby allows legal experts to navigate these subjective dilemmas, provide uniform

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[23] Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 ME. L. REV. 21, 45-46 (1997) ("Lawyers trained in the American system tend to view law as a tool to accomplish desired ends, rather than as a static body of principles and rules. Lawyers, as law students, have been taught to work with the legal materials at their disposal in innovative ways to create new legal doctrines and theories to advance the causes of their clients."). *See also* Katerina P. Lewinbuk, *Perestroika or Just Perfunctory? The Scope and Significance of Russia's New Legal Ethics Laws*, 35 J. LEGAL PROF. 25, 53 (2010) (contrasting the attorney's role in civil law (Russian, European) and common law (American) jurisdictions: "[H]is ultimate duty is to the court and society in the civil law system and thus he should help minimize the burden placed on the court system, while the attorney is completely independent in a common law system and is not considered a part of the court system."); Janeen Kerper & Gary L. Stuart, *Rambo Bites the Dust: Current Trends in Deposition Ethics*, 22 J. LEGAL PROF. 103, 107 (1998) ("While American lawyers often feel torn by the tension between the duty of zealous advocacy and the duty to the larger system of justice, this conflict is less troublesome to British barristers like Lord Brougham who swear an oath to seek only the truth and whose traditions strongly emphasize the preeminence of the advocate's obligations to justice and the court.... The concept of court first, client second has long been more generally accepted by British lawyers than it is by Americans.").

[24] Albert W. Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or A Categorical Imperative?*, 52 U. COLO. L. REV. 349, 351-52 (1981) ("People with legal problems need help; they often do not understand the complicated legal system in which they are enmeshed. Their sense of fairness (as well as ours) is enhanced when they need not fend for themselves —when they are entitled to the services of other people who understand the system and whose function within the system is to be on their side. This simple and powerful ideal of legal representation is obviously sacrificed when a client senses that his attorney's loyalties are divided.").

[25] Richard K. Greenstein, *Against Professionalism*, 22 GEO. J. LEGAL ETHICS 327, 341 (2009) ("Unlike many other professionals, lawyers act in an agency capacity. Doctors *treat* patients, but lawyers *represent* clients. That means that lawyers will routinely interact with individuals and institutions whose interests are different from and often adverse to those of the client. And *that* means that serving the client's interests will frequently appear to encourage acts by the lawyer that will harm those third parties.").

representation as part of a fair and balanced system, and rely on the adversarial court system to sort out truth and justice.[26] Finally, the promise of loyalty promotes the use and quality of legal services.[27] While the same could be said for any service or business, the promise of loyalty is especially important in the context of binding legal systems because clients may be mistrustful of legal experts who work within a system that may exert coercive force over the client. At least one study has shown that a majority of laypersons believe that professionals who do not address binding laws (such as priests, doctors, and psychologists) have greater obligations to keep secrets and are more

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[26] McChrystal, *supra* note 19, at 387 ("Lawyers can envision a proper balance of the conflicting loyalties to which they will be subject in their work. Ethics rules exemplify a formal effort to do just that"); *Id.* at 388 ("these difficult questions lead to this conclusion: even the most clear-cut moral priorities can lose their force in unanticipated and extraordinary circumstances"); Greenstein, *supra* note 25, at 329 ("Ethical simplification for legal professionals rests on two pillars, which I will call the rule of partiality (the requirement that ethical priority be accorded the client) and the 'no remainder' principle (the tenet that following the rule of partiality exhausts the professional's ethical responsibility)."); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 706 (1981) ("In any system of justice, particularly one whose central premise is combative, participants must share a common understanding of the ground rules that constrain their partisanship.").

[27] George H. Brown, *Financial Institution Lawyers As Quasi-Public Enforcers*, 7 GEO. J. LEGAL ETHICS 637, 712 (1994) ("It is easy to understand why unsophisticated individuals need to be encouraged to confide all to their lawyer, and the promise of unyielding loyalty promotes a more effective system of criminal justice."); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 358 (1989) ("clients will not employ lawyers, or at least will not provide them with adequate information, unless all aspects of the attorney-client relationship remain secret"); McChrystal, *supra* at note 19, at 401 ("'Exit,' as developed in economic theory, refers to the actions of customers who stop buying a firm's product and of members of an organization who leave the organization.... 'Voice,' a term borrowed from political theory, is exercised when a firm's customers or an organization's members express dissatisfaction to management or others.... Loyalty is a self-imposed barrier to exit, and, like most barriers to exit, it serves to stimulate voice."); Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, a Guilty Client, an Innocent Condemned Man, and an Ethics Seeking Defense Counsel,* 29 LOY. L.A. L. REV. 1611, 1624 (1996) (stating that "confidentiality improves the quality of legal advice that lawyers give clients. Improved legal advice leads to more just verdicts and settlements and to more fair transactions, thus benefitting society as a whole."); Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836, 845 (2006) ("A child who is unpersuaded by the attorney's loyalty may withhold critical information from the attorney and compromise the lawyer's ability to provide relevant and useful advice.").

trustworthy with information than are legal professionals.[28] There are, therefore, a wide variety of reasons for professionals in the field of binding law to guarantee loyalty to their clients.

However, to truly determine whether experts on binding law owe heightened loyalty to their clients, the duties placed on such experts must be compared the duties of experts in other fields. The hypothesis explored below is that legal professionals must carry duties of loyalty to clients that do not exist in other professions.

Because experts who provide important services directly to the public carry considerable power over their clients[29]—who may not understand this esoteric body of knowledge well enough to regulate such autonomous professionals themselves[30]—the public prestige that marks the professions[31]

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[28] Zacharias, *supra* note 27, at 384. (citing a Yale study that found that clients were more likely to believe that professional who do not work within broader systems that exercise direct authority over the client (priests, doctors, psychologists, and psychiatrists) were more likely to maintain confidences than professionals who work within such systems (attorneys, accountants, social workers. The author notes that "[f]ew were prepared to trust lawyers over priests, doctors, psychologists, or psychiatrists.").

[29] Luisa Antoniolli, *Consumer Law as an Instance of the Law of Diversity*, 30 VT. L. REV. 855, 878 (2006) ("[I]t is usually considered necessary to provide consumers with all relevant information, rather than prescribing the content of contract. Once consumers have this information, they will be able to look after their own interests. Nevertheless, ... there is an inherent difference in the position—and consequently the power—of a consumer and a professional...."); Hugh P. Gunz & Sally P. Gunz, *Client Capture and the Professional Service Firm*, 45 AM. BUS. L.J. 685, 692 (2008) ("The collegiate professions were traditionally law, medicine, and the priesthood. They were evidenced by a degree of mystification of knowledge that increased the power and social distance between professional and client.").

[30] Greenstein, *supra* note 25, at 331-32; Criton A. Constantinides, *Professional Ethics Codes in Court: Redefining the Social Contract Between the Public and the Professions*, 25 GA. L. REV. 1327, 1332 (1991) ("One of the most basic characteristics of a profession is the existence of a body of esoteric knowledge on which the practitioner relies. Professionals derive much of their power through their exclusive access to that knowledge which is gained through formal education and training.").

[31] Hon. Alva Hugh Maddox, *Lawyers: The Aristocracy of Democracy or "Skunks, Snakes, and Sharks?"*, 29 CUMB. L. REV. 323, 326 (1999) ("Although there is no specific agreement on what distinguishes a profession from a trade or business, it is generally accepted that a profession involves the pursuit of a learned art that requires superior intellectual ability, and that the services that are rendered by professionals are vital to society."); Greenstein, *supra* note 25, at 331-32; Constantinides, *supra* note 29, at 1332 ("One of the most basic characteristics of a profession is the existence of a body of esoteric knowledge on which the practitioner relies. Professionals derive much of their power through their exclusive access to that knowledge which is gained through formal education and training.").

also arouses public concern.[32] Though the consumer retains the market power to choose the most loyal expert,[33] the desire to foster public trust[34]and regulate their colleagues[35] have led professionals to form official organizations and disseminate ethics rules codifying the various loyalties owed by practitioners. [36] So, while the creation of ethics codes is not entirely understood[37] and certainly not uniform, it appears to be clear that the professions draft these rules in order to benefit their specific profession as a

[32] "The importance of services provided by professionals—the widespread sense that they are crucial to the 'day-to-day functioning of society'—tends to generate a concern about ethical behavior. This concern has both a public dimension (criticism of professionals for departing from proper ethical conduct) and a dimension within the profession (a gatekeeping desire to limit membership in the profession to those who adhere to identifiable ethical standards)." Greenstein, *supra* note 25, at 332.

[33] Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1408 (1998) ("Clients have a powerful mechanism for enforcing their concept of positional loyalty quite independent of the bar's ethical mandates. A paying client's market power gives her the freedom to shop around for the firm that meets her expectations of loyalty.").

[34] Rhode, *supra* note 26, at 692-93. ("A principal function of all professional organizations is to protect their members' economic and psychological stake in public esteem. Codes of ethics are useful insofar as they define a satisfactory self-image and help persuade the general public that practitioners are especially deserving of confidence, respect, and substantial remuneration.").

[35] Warren E. Burger, *Ethics and the Law*, 42 S.C. L. REV. 782, Preface (1991) ("A true profession is one that polices itself.")

[36] McChrystal, *supra* note 19, at 384 ("Loyalty, then, can be an organizing principle for moral decisionmaking in the sense that many moral issues often require a choice between loyalties."); *id.* at 387 ("[L]awyers can envision a proper balance of the conflicting loyalties to which they will be subject in their work. Ethics rules exemplify a formal effort to do just that."); Greenstein, *supra* note 25, at 332 ("[E]xternal and internal pressures frequently resolve themselves in the promulgation of 'official' ethics codes by the organized professionals.").

[37] Mark H. Aultman, *The Story of a Rule*, 2000 L. REV. MICH. ST. U. DET. C.L. 713, 716-17 (2000) ("Why codes of legal ethics had to come is still debated, and not all the reasons are accepted or understood.").

whole,[38] even though such rules restrain individual practitioners.[39] Because authorities in each field create and modify professional ethics codes to strike a balance between autonomy and baseline requirements for their practitioners, ethics rules should therefore mark the appropriate degree of loyalty owed by each profession to their respective clients.

While the obligation of competent[40] and diligent[41] services tends to be mandated by simple directive, the duty of loyalty is addressed in these ethics codes under rules regarding conflicts of interest.[42] This is likely because issues

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[38] Rhode, *supra* note 26, at 689-90. ("From the profession's standpoint, codes of ethics are a primary instrument for attaining what Talcott Parsons posited as the dominant goals for any occupation: objective achievement and recognition. Codified standards can generate monetary and psychic benefits by enhancing occupational status and self-image; constraining competition; preserving autonomy; and reconciling client, colleague, and institutional interests. From a societal perspective, however, professional codes are desirable only insofar as they serve common goals to a greater extent than other forms of control, namely market forces or government regulation."); Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87 (2003) ("A long-standing scholarly tradition regards professions, in general, and ethics rules, in particular, as 'projects' of market control.").

[39] Sean J. Griffith, *Ethical Rules and Collective Action: An Economic Analysis of Legal Ethics*, 63 U. PITT. L. REV. 347, 349 (2002) "Because the rules of legal ethics are drafted by the organized bar, an association of self-interested lawyers, the rules of legal ethics should thus be seen as a means of maximizing the welfare of lawyers. On the one hand, it may seem counter-intuitive to assert that the rules of legal ethics advance lawyers' self-interest when, in fact, the rules generally seem to restrain the self-interest of lawyers.")

[40] Model Rules of Prof'l Conduct, R. 1.1 (2009); Ethical Principles of Psychologists and Code of Conduct, Standard 2 (2010); American Medical Association's Code of Medical Ethics, Opinion 8.11, Opinion 9.01 (1982); Code of Ethics of the National Association of Social Workers, 1.04 (1996); American Institute of Certified Public Accountants Code of Professional Conduct, 0.300.060 (2014).

[41] MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 2009); CODE OF MED. ETHICS Op. 8.11 (AM. MEDICAL ETHICS 1996); CODE OF MED. ETHICS Op. 9.14 (AM. MEDICAL ETHICS 2009); CODE OF ETHICS 1.01 (NAT'L ASS'N OF SOC. WORKERS 1996); CODE OF PROF'L CONDUCT 0.300.060 (AM. INST. OF CERTIFIED PUB. ACCTS. 2014).

[42] Audrey I. Benison, *The Sophisticated Client: A Proposal for the Reconciliation of Conflicts of Interest Standards for Attorneys and Accountants*, 13 GEO. J. LEGAL ETHICS 699, 712 (2000) (noting that three issues, including "the overarching concern of loyalty to the client, underlie the rules regulating conflicts of interest"); Donald R. Lundberg, *We Really Are All in This Together: Imputation of Conflicts of Interest*, RES GESTAE, October 2012, at 15 ("Imputation is a powerful limitation...client loyalty is the driving consideration here."); Rebecca A. Lewis, *As A Matter of Fact...Practice Tips from Bar Counsel*, WYO. LAW, 36, 32 (2008) (noting that Rule 1.7, concerning conflicts of interest with current clients "is really about loyalty to your client."); J. Anthony McLain, *Part-Time Judges, Part-Time Assistant District Attorneys and Imputed Disqualification*, 70 ALA. LAW. 217, 219 (2009) (discussing "the true purpose of rules 1.7(a) and 1.10(a), which

of loyalty involve a balancing of interests to the client, to the profession, and to society.[43] As a result, if legal professionals carry a higher burden of loyalty to their clients[44] by nature of assisting them in their fight against the binding legal procedures imposed by the rest of society, then the conflict of interest rules should be more onerous for legal professionals than for other professionals.[45]

Conflict of interest rules do vary among the professions, ranging along a continuum from prohibitions of conflicts between the client and professional to prohibitions of conflicts between clients of the same professional to prohibitions of conflicts between clients of different professionals who work in the same firm.

The most basic rules regarding conflicts of interest prohibit the professional from assisting any client whose personal interests are contrary to the professional's "personal interests" (personal conflicts of interest).[46] To

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is the preservation of client loyalty and confidences"); Captain Donald L. Burnett, Jr., USAR, *The Proposed Rules of Professional Conduct: Critical Concerns for Military Lawyers,* ARMY LAWYER, February 1987, at 19, 23 ("Rules prohibiting conflicts of interest arise from two fundamental principles in lawyer-client relationships: confidentiality and loyalty."); Lee E. Hejmanowski, *An Ethical Treatment of Attorneys' Personal Conflicts of Interest*, 66 S. CAL. L. REV. 881, 899 (1993) ("The reasons to prohibit attorney-client conflicts thus include (1) the fear that the attorney's pursuit of personal goals will violate the duty of loyalty attorneys owe their clients..."); Shira Mizrahi, *Up Against the Wall: A Guide to the Effective Screening of Former Government Attorneys in New York,* 10 CARDOZO PUB. L. POL'Y & ETHICS J. 131, 145 (2011) ("Courts have reasoned, '[a] lay client is likely to doubt the loyalty of a lawyer who undertakes to oppose him in an unrelated matter.' As such, rules regulating attorneys' professional conduct have prohibited them from working on matters which would be considered adverse to a client's interest.").

[43] Nancy J. Moore, *"In the Interests of Justice": Balancing Client Loyalty and the Public Good in the Twenty-First Century*, 70 FORDHAM L. REV. 1775 (2002); McChrystal, *supra* note 19, at 384 ("Loyalty, then, can be an organizing principle for moral decisionmaking in the sense that many moral issues often require a choice between loyalties."); *id.* at 387 ("[L]awyers can envision a proper balance of the conflicting loyalties to which they will be subject in their work. Ethics rules exemplify a formal effort to do just that.").

[44] Mizrahi, *supra* note 42, at 144-45. ("One of the cornerstones underlying all attorney ethics rules is that attorneys have a duty to remain loyal to their clients. This duty is threatened when attorney conflicts of interest arise.").

[45] Michelle Querijero, *Without Lawyers: An Ethical View of the Torture Memos,* 23 GEO. J. LEGAL ETHICS 241, 247 (2010) ("It is the binding nature of the legal advice provided by the OLC that magnifies the importance of the ethical obligations of such lawyers.").

[46] Lee E. Hejmanowski, *An Ethical Treatment of Attorneys' Personal Conflicts of Interest*, 66 S. CAL. L. REV. 881, 882 (1993) ("'[P]ersonal' conflicts of interest, differ from typical conflicts, which involve the adverse interests of competing clients.").

avoid incentives for the professional to take advantage of their clients' trust or confidences,[47] these personal conflicts of interest are prohibited by all codes of professional ethics.[48] Next, when professionals assist their clients in matters of competing interests, prejudice is presumed if the professional also assists people with adverse interests,[49] and conflict of interest rules thereby take a further step by prohibiting conflicting representations.[50] The rationale behind these rules is that the professional should not be allowed to use their position of trust with one client against another and should not offer substandard services to the disfavored of two opposing clients.[51] The imputation of conflicts expands the preventative rule against assisting antagonistic clients[52] by preventing professionals working in the same firm

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[47] Sharon Mary Mathew, *Stock-Based Compensation for Legal Services: Resurrecting the Ethical Dilemma,* 42 SANTA CLARA L. REV. 1227, 1231 (2002) ("An attorney owes many duties to his clients.... All of these ethical concerns are threatened when an attorney's personal interests conflict with the interests of his client.... This rationale is clearly 'preventive' in nature.").

[48] MODEL RULES OF PROF'L CONDUCT r. 1.7-1.10 (AM. BAR ASS'N 2009); ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT Standard 3.06 (AM. PSYCHOL. ASS'N 2010); CODE OF MED. ETHICS Op. 8.03 (AM. MEDICAL ETHICS 1996); CODE OF ETHICS 1.06 (NAT'L ASS'N OF SOC. WORKERS 1996); CODE OF PROF'L CONDUCT 1.110.010, 1.110.010 (AM. INST. OF CERTIFIED PUB. ACCTS. 2014); CODE OF PROF'L CONDUCT Standard 3.4 (AM. ASS'N FOR MARRIAGE AND FAMILY THERAPY (2015).

[49] Richard W. Mass, *Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the 'Rolls Royce of Attorneys' with the 'Fruits of the Crime'?*, 39 STAN. L. REV. 663, 677 (1987) ("[P]rejudice is presumed if the defendant proves that his lawyer 'actively represented conflicting interests'...the rationale underlying this presumption should similarly apply to all conflicts of interest an attorney faces. A lawyer owes his client a duty of loyalty; a duty to avoid conflicts of interest.").

[50] NAT'L ASS'N OF SOC. WORKERS, *supra* note 48 ("Social workers should not engage in dual or multiple relationships with clients or former clients in which there is a risk of exploitation or potential harm to the client.") However, note that this rule does not lead to removal or disqualification and goes on to allow for these conflicts with protective action. *See id.* ("Social workers who anticipate a conflict of interest among the individuals receiving services or who anticipate having to perform in potentially conflicting roles . . . should clarify their role with the parties involved and take appropriate action to minimize any conflict of interest.").

[51] RESTATEMENT (THIRD), LAW GOVERNING LAWYERS, §122 cmt. b ("The prohibition against lawyer conflicts of interest is intended to assure clients that a lawyer's work will be characterized by loyalty, vigor, and confidentiality.").

[52] Donald R. Lundberg, *We Really Are All in This Together: Imputation of Conflicts of Interest*, RES GESTAE, October 2012, at 19 ("Imputation of conflicts of interest is a powerful mechanism that expands on the personal loyalties and duties to clients that all lawyers naturally feel to institutionalize those loyalties...").

from assisting clients with adverse interests.[53] Because it makes broad assumptions about professionals obtaining and sharing information,[54] and is more a cosmetic rule that avoids the appearance of impropriety that occurs when professional adversaries share an overarching relationship,[55] professions that impute conflicts of interest hold the highest concern for their practitioners' duty of loyalty to the individual client. By preventing two professionals with aligned interests from assisting clients with adverse interests, this ethical scheme elevates loyalty through insulated independence between the professionals. Thus, the behaviors decreed in ethical conflicts of interest rules range from promoting diligence to promoting loyalty to promoting independence.

The hypothesis that experts on society's binding laws owe the highest duty of loyalty to their clients appears to be confirmed by comparative analysis of conflict of interest rules between legal professionals and professionals who do not oppose the collective will of society on behalf of their clients.

First, professionals who are responsible for their clients' individual well-being are only precluded from taking on clients with personal conflicts of interest. Physicians do not face ethical quandaries by attending to combatants who have caused physical wounds to each other,[56] and psychologists are not ethically prevented from counseling people who are causing each other mental

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[53] MODEL RULES OF PROF'L CONDUCT r. 1.7-1.10 (AM. BAR ASS'N 2009); Lundberg, *supra* note 42, at 15 ("The basic idea of imputed conflicts is straightforward, no lawyer in a firm may represent a client if any lawyer in the firm would be personally conflicted from handling the client's matter."); Geoffrey C. Hazard, Jr., *Imputed Conflicts of Interest in International Law Practice,* 30 OKLA. CITY U. L. REV. 489, 492 (2005) ("The basic approach in the American rules has been that if one lawyer in a firm is personally precluded from a prospective multiple representation, then all lawyers in the firm are similarly precluded.").

[54] Hejmanowski, *supra* note 46, at 909-10 ("Courts actually make two presumptions when they apply vicarious disqualification in successive representation conflicts. The first presumption is that the attorney obtained knowledge of a client's confidences while at the former firm. The second presumption is that the attorney has shared those confidences with members of the new firm.").

[55] The appearance of impropriety was the early rationale for imputing conflicts in American courts. Though this standard fell out of use because it was too subjective, the overarching concern remain the driving rationale for the rule. *See id.* at 903-04 (1993) ("One problem with the appearance-of-impropriety standard is the issue of who ought to judge the appearance of impropriety.... In perhaps the most commonly cited explanation of the shift away from Canon 9, the Court of Appeals for the Second Circuit stated that 'when there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases.'").

[56] CODE OF MED. ETHICS Op. 8.03 (AM. MEDICAL ETHICS 1996).

distress,[57] though they must keep the confidences of individual clients.[58] This ethical treatment makes sense; professionals who focus on individual, internal problems do not promote certain interests in direct opposition to other interests, and such professionals should be ethically unhindered from helping as many people as possible, regardless of their relationships to others. Therefore, these professionals do not owe a duty of loyalty to clients when assisting them in strictly individual problems.

On the other hand, professionals who address interpersonal issues[59] have ethical duties beyond personal conflicts that restrain them from assisting clients who have antagonistic interests.[60] This shift from regulating professional-client conflicts only to also prohibit client-client conflicts is illustrated in the contrast between social workers and other mental health professionals. Though they share educational backgrounds in human behavior and can perform functions similar to other therapists, social workers assist their clients in dealing with larger entities such as government agencies and community groups.[61] As a result, unlike other mental health professionals, social workers are ethically cautioned from providing services to clients with conflicting interests.[62] Ethical rules precluding conflicts of interest between

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[57] ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT Standard 3.06 (AM. PSYCHOL. ASS'N 2010). Though psychologists are cautioned to avoid "multiple relationships" in Standard 3.05, this rule appears to be directed at a personal relationship conflicting with a professional relationship, rather than a professional relationship conflicting with another professional relationship. Standard 3.05 more closely resembles the American Association for Marriage and Family Therapy, Code of Professional Ethics Standard 1.3 than rules that prohibit assistance to clients with adverse interests.

[58] Samuel J. Knapp, *Privileged Communications for Psychotherapists in Pennsylvania: A Time for Statutory Reform,* 60 TEMP. L.Q. 267, 268 (1987) ("The rules of confidentiality originated in the ethical codes of the mental health professions.").

[59] Michael T. Colatrella Jr., *A "Lawyer for All Seasons": The Lawyer as Conflict Manager*, 49 SAN DIEGO L. REV. 93, 100 (2012) ("Few professionals deal with conflict more consistently and directly than lawyers. Business, health care, and sales professionals all encounter a good number of conflicts in their day-to-day professional lives, but these conflicts are ancillary to their professions.... Unlike these professionals, the main business of most lawyers is conflict."); CODE OF ETHICS Preamble (NAT'L ASS'N OF SOC. WORKERS 1996) (The "defining feature of social work is the profession's focus on individual well-being in a social context and the well-being of society.").

[60] MODEL RULES OF PROF'L CONDUCT r. 1.7-1.9 (AM. BAR ASS'N 2009); CODE OF ETHICS 1.06 (NAT'L ASS'N OF SOC. WORKERS 1996).

[61] CODE OF ETHICS 1.06 (NAT'L ASS'N OF SOC. WORKERS 1996) ("Social workers are cognizant of their dual responsibility to clients and to the broader society. They seek to resolve conflicts between clients' interests and the broader society's interests in a socially responsible manner consistent with the values, ethical principles, and ethical standards of the profession.").

[62] *Id.*

clients of the same professional are therefore tied to the degree that the professional's assistance opposes others on behalf of the client.

By addressing laws that the collective society has determined to be binding on individuals and thereby opposing the rest of society on behalf of their clients, legal professionals expand on this trend by prohibiting conflicts not only between clients of the same professional, but also conflicts between clients of multiple professionals in the same firm or office (full independence).[63] Again contrasting these professional roles, while social workers can assist clients in dealing with powerful government agencies, they, unlike legal professionals, do not take on a fiduciary duty with regards to the forcible deprivation of their clients' rights. Legal professionals, whose advice often serves as a proxy for the state in its imposition of binding law, owe a heightened duty of loyalty to clients, and the imputation of conflicts is the keystone to this loyalty.[64]

Now, it could be argued that legal professionals—namely attorneys—owe a heightened duty of loyalty because they operate in an adversarial system of justice.[65] However, there is another legal professional that confronts the forcible deprivation of their clients' property by society's binding rules[66] but

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[63] Hejmanowski, *supra* note 46, at 902 ("[T]he doctrine of imputed disqualification recognizes that if one attorney's loyalty is in jeopardy, the loyalty of all attorneys in the firm is threatened.").

[64] Lawrence J. Fox, *All's O.K. Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics*, 29 HOFSTRA L. REV. 701, 728 (2001) ("[I]mputation is the foundation stone of the legal profession's commitment to the core value of loyalty to clients. Imputation holds that all lawyers within a given practice setting carry with them the obligation to uphold the loyalty interests of the clients of every other lawyer in the practice setting. If any lawyer in the firm or law office is representing A, then no one else in the firm can take on a matter adverse to A, without A's informed consent."); Fallyn B. Reichert, *"Screening" New York's New Rules-Laterals Remain Conflicted Out*, 31 PACE L. REV. 464, 471 (2011) (citing arguments that "the fiduciary duties of loyalty and confidentiality are the 'heart of the lawyer-client relationship' and the imputation of conflicts protects clients, which is the very purpose of the Model Rules").

[65] See *infra* Section I.C.

[66] Rimma Tsvasman, *A Case for the IRS's Full Compliance with the Administrative Procedure Act*, 76 BROOK. L. REV. 837, 839 (2011) ("[T]he IRS...has power to pass binding law and adjudicate matters in its own right."); David P. Korteling, *Let Me Tell You How It Will Be; Here's One for You, Nineteen for Me: Modifying the Internal Revenue Service's Approach to Resolving Tax Disputes*, 7 ADMIN. L.J. AM. U. 659, 676–77 (1994) ("The IRS can issue 'private' or 'letter' rulings (advance rulings), or pre-filing determination letters, thereby exercising considerable influence over taxpayer behavior through regulations and through advice it gives to taxpayers preparing returns.").

does not operate in an adversarial system[67]—certified public accountants. If the elevated duty of loyalty marked by imputed conflict of interest rules were unique to all legal professionals, and not only zealous, adversarial advocates, then ethical rules should impute conflicts of interest not only between attorneys but also between accountants. Because imputation of conflicts within a firm limits business especially for the accounting mega-firms[68] and increasingly large law firms,[69] both attorneys and accountants would naturally prefer to not have available business so encumbered. And because accountants compete with attorneys for the same business[70] as played out in the debate over Multidisciplinary Practices ("MDPs")[71], each will set forth the ethical restrictions that strike an optimal balance between limiting business for their

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[67] Tia Breakley, *Multidisciplinary Practices: Lawyers & Accountants Under One Roof?*, 2000 COLUM. BUS. L. REV. 275, 292 (2000) ("[I]t is important to remember that the nature of conflict in law firms is often very different than that in accounting firms. Conflicts arising in law firms are often associated with litigation in which significant amounts of money are at stake. In contrast, conflicts that arise in accounting firms are generally not adversarial.").

[68] *See* Rees M. Hawkins, *Not "If," but "When" and "How": A Look at Existing De Facto Multidisciplinary Practices and What They Can Teach Us About the Ongoing Debate*, 83 N.C. L. REV. 481, 482 n.8, 509 (2005) ("[A]s a result of their sheer size, enforcing imputation in the Big Four [accounting firms] would be nearly impossible.... The Big Five include Ernst & Young LLP, Deloitte & Touche LLP, PriceWaterhouseCooper, KPMG LLP, and Arthur Andersen LLP. While Arthur Andersen collapsed in the wake of the Enron scandal, this Comment refers to the Big Five generally, as all five professional service firms have contributed to the MDP debate. The author only refers to the Big Four when discussing the current or future impact of these large professional firms.").

[69] *See* Steven H. Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227, 228–29 (1987) ("The number of lawyers in the United States nearly doubled from 355,000 in 1969 to 649,000 in 1984. The number and size of large law firms grew exponentially.... The traditional conflict of interest rule, prohibiting representation of adverse interests in the same matter, caused occasional and inadvertent difficulty for the newly mobile lawyers and the megafirms they joined and left. The real problem, however, was the successive conflict time bomb...triggered by the imputed disqualification...restriction on a lawyer working against a former client in a substantially related matter, coupled with application of that disqualification to all other lawyers in the firm....").

[70] *See* Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 707–08 (1977) ("While the variety of competitors confronted by the Bar has been broad, five or six major areas continue to be the primary source of controversy: debt collection, preparation of real estate contracts, sale of kits or forms for divorce or probate, *tax counseling*, and appearance before specialized administrative agencies.") (emphasis added).

[71] *See* Kathryn Lolita Yarbrough, *Multidisciplinary Practices: Are They Already Among Us?*, 53 ALA. L. REV. 639, 639 (2002).

professionals and attracting clients from the other profession. As a result, the battle over whether the ABA would relax its conflict rules or whether the American Institute of Certified Public Accountants ("AICPA") would elevate its conflict rules presented a market determination of clients' demand for loyalty from professionals handling the forcible deprivation of their property.[72] Though the AICPA initially fought against the application of the imputation doctrine—originally unique to attorney ethics[73]—to accounting firms that employed attorneys,[74] recently the AICPA amended its ethics rules to impute client conflicts between members in public practice in the same firm.[75] The battle for market control illustrated in the clash between the ABA's and AICPA's ethics codes clearly demonstrates that clients who confront the forcible deprivation of their property and rights by the state demand a degree

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[72] *See* Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87, 87 (2003) ("A long-standing scholarly tradition regards professions, in general, and ethics rules, in particular, as 'projects' of market control. It is no surprise, critics charge, that in the latest assault on the monopoly of the American legal profession—waged by multidisciplinary professional service firms—lawyers are hiding behind their ethics rules to protect their turf.").

[73] *See* Yarbrough, *supra* note 71, at 654 ("[A]ttorneys impute conflict of interest at the firm level, which other professions do not...."). *See also* Robert E. Guillory, Jr., *Wide-Eyed Deer in the Headlights*, 47 L.A. B.J. 192, 192 (1999) ("No other profession [other than attorneys] has the same obligation of loyalty to the client, including imputation of conflicts to all members of the practice entity.").

[74] *See* George C. Nnona, *Towards A Reformed Conception of Multidisciplinary Practice*, 56 CLE. ST. L. REV. 533, 556 (2008) ("The AICPA further objects, as clearly inappropriate and overreaching, to the [ABA's Commission on Multi-Disciplinary Practices]'s proposal to unilaterally impose the legal rules of conduct on accounting firms that include lawyers.... The AICPA thus leaves no one in doubt that while it is amenable and indeed desires the liberalization of the legal profession's restrictions on MDP, it has no inclination towards accepting the restrictions implicated by the core ethical values regarding conflicts of interest.").

[75] CODE OF PROF'L CONDUCT ET § 102.03 Rule 102-2 (AM. INST. OF CERTIFIED PUB. ACCTS. 2014) ("A conflict of interest may occur if a member performs a professional service for a client...and the member or his/her firm has a relationship with another person, entity, product, or service that could be viewed as impairing objectivity."); Ethical Issues Facing Tax Practitioners 203, 211 (ALI-ABA). *See also* CODE OF PROF'L CONDUCT 1.110.101.02 (AM. INST. OF CERTIFIED PUB. ACCTS. 2014) ("A conflict of interest creates adverse interest and self-interest *threats* to the *member's* compliance with the "Integrity and Objectivity Rule" [1.100.001]. For example, *threats* may be created when: *a.* the *member* or the *member's firm* provides a *professional service* related to a particular matter involving two or more *clients* whose interests with respect to that matter are in conflict, or *b.* the interests of the *member* or the *member's firm* with respect to a particular matter and the interests of the *client* for whom the *member* or the *member's firm* provides a *professional service* related to that matter are in conflict.") (emphasis added).

of loyalty in which their professional is independent from, and therefore in no way aligned with, other professionals who are assisting adverse interests.

The driving point of this subsection is that, because they assist clients against the collective will of the rest of society, experts on binding law must promise a heightened degree of loyalty to clients by operating independently. As a result, two sides of a dispute that are likely to invoke the binding power of law must be guided by independent legal experts. The practical implications of this point lie in the inverse—when two sides wish to negotiate and thereby avoid a decision imposed by the state, independent advocates are not necessary. To be clear, particular disputants may still prefer to bring independent advocates to a negotiation; however, such an aggressive degree of loyalty may be obstructive to the free flow of ideas that are characteristic of productive negotiations. Using the above framework for determining how loyalty is suited to the professional's role, an expert focusing on interpersonal conflict outside of the binding impact of law should only be precluded from assisting multiple clients who have adverse interests. These professionals would, therefore, not be precluded from operating in the same office or even working as a team, unlike their legal counterparts who impute such conflicts.

Though independent advocates such as attorneys provide direct support to disputants in cases that largely end in negotiation, it would appear as though such independence was only merited when the power of the state was invoked through pending litigation. If advocates were to focus entirely on negotiation, and thereby avoid the application of binding law, then such independence would be unnecessary and even counterproductive. The most obvious application of this conclusion involves collaborative law—a process in which two attorneys focus on negotiation by agreeing to withdraw if either party wishes to proceed to litigation.[76] Though many states have recognized the benefit of negotiation-focused advocacy and allowed collaborative law to develop, at least one state has decided that this process involves a per se violation of the strict loyalty owed by attorneys to their clients.[77] As this section suggests, advocates who focus on communication and negotiation skills rather than the application of binding law should operate under an entirely different ethic of loyalty. Just as legally trained professionals do not

[76] *See* Stu Webb, *Collaborative Law Introduction*, 4 PEPP. DISP. RESOL. L.J. 315 (2004).

[77] *See* Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 311–12 (2008) ("In 2007, however, the Colorado Bar Association issued an opinion declaring collaborative practice unethical *per se*.... The opinion asserts that CL implicated Rule 1.7(b) because it 'involves an agreement between the lawyer and a "third person" (i.e., the opposing party) whereby the lawyer agrees to impair his or her ability to represent the client [by discontinuing] the representation in the event that the [CL] process is unsuccessful.'").

form attorney-client relationships when acting as mediators, attorneys who offer negotiation-focused advocacy should not necessarily do so as attorneys.

However, the independence that is required in the face of binding legal authority is only one example of how protocols designed for attorneys are misapplied to dispute resolution professionals who focus on negotiation. Further conventions that specifically demand independence between advocates include the process of applying binding law and the procedures required within this system.

B. *Unilateral Court Procedures Require Separate Advocates*

While the previous section focused on the theoretical power of binding law to show why experts in this field must be independent, this section draws a similar conclusion by exploring the practical application of the law through the court system. Like the previous section, however, the link between litigation advocacy and independence is identified here to show that advocates who operate outside of decision-based dispute resolution processes should not be required to function separately from each other.

To be meaningful, binding law must be applied to members of society. This application occurs when the judiciary calls upon legal authority to resolve disputes between individuals or groups.[78] Though this point is too obvious to receive much attention in the case law or academic literature, the method that the courts use to apply the law is based upon a decision handed down by a single judge or a majority of a multiple-judge panel that considers the information presented by the disputants.[79]

Just as any process has specific inputs and outputs, the most basic element of what goes into the judicial process is conflicting stories or interests[80] and

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[78] *See* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2070 n.169 (1999) (citing MODEL CODE OF JUD. CONDUCT Preamble (AM. BAR ASS'N 1990)) ("Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us.").

[79] *See* Hon. Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge's Perspective*, 9 U.C. DAVIS J. JUV. L. & POL'Y 57, 58 (2005) ("Reduced to its essence, the product of judicial institutions is a decision. This much is not disputed.... America has a long commitment to decision-making through the adversarial process. American judges and lawyers are educated in the adversarial method of dispute resolution.").

[80] *See* Stephan Wittich, *Permissible Derogation from Mandatory Rules? The Problem of Party Status in the Genocide Case*, 18 EUR. J. INT'L L. 591, 608 (2007) ("It is a feature of procedural law common to any judicial or, for that matter, arbitral procedure that, before the court or tribunal may deal with the merits of a dispute brought before it, procedural

the most basic outcome is a final decision that resolves the dispute.[81] This system therefore relies on individuals to initiate and fuel the clash of perspectives on which the judge will use the power of the state to rule.[82] An authoritative decision is necessary because consensus is not always possible and the status quo may be unjust. If consensus were possible, the disputants would not need a powerful third party decision-maker and would not have initiated the process. And people who violate interests protected by the law by following their own self-interests are unlikely to be motivated to change this behavior without the intervention of a powerful third party decision-maker. Litigation is therefore the process by which unjust power imbalances between individuals and violations of binding social norms are raised by the affected parties and resolved by judicial decision.[83]

The most basic procedural requirement of the adjudicatory framework for dispute resolution is that each disputant must be able to proceed separately, without the agreement of the opposing interest. Compulsory or unilateral action is therefore the key benefit of litigation.[84] The aggrieved party has a unilateral right to call upon the power of the state through the judiciary to consider remedial action.[85] So, in seeking assistance with the interpretation

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conditions of a general kind must be met. One of these conditions, probably the most fundamental one, is that the court or tribunal is open to the parties to the dispute.").

[81] *See* Diane S. Kaplan, *Immaculate Deception: The Evolving Right of Paternal Renunciation*, 27 WOMEN'S RTS. L. REP. 139, 142 n.36 (2006) (citing 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4403 (2d ed. 2002)) ("The central role of adversary litigation in our society is to provide binding answers.").

[82] *See* Eran B. Taussig, *Broadening the Scope of Judicial Gatekeeping: Adopting the Good Faith Doctrine in Class Action Proceedings*, 83 ST. JOHN'S L. REV. 1275, 1336–38 (2009) (noting that the American and Israeli adversarial "legal systems rely upon private litigants to enforce substantive provisions of law that, in civil law legal systems, are left mostly to the discretion of public enforcement agencies," and later noting that "in the United States the government has increasingly given private citizens the power to bring lawsuits to enforce statutes").

[83] *See* Timothy P. O'Neill, *There Will Be Blame: Misfortune and Injustice in "The Sweet Hereafter"*, 5 DEN. U. SPORTS & ENT. L.J. 68, 70 (2008) ("[L]itigation can direct the community's blame towards the proper parties."). *See also* Joseph B. Stulberg, *Questions*, 17 OHIO ST. J. DISP. RESOL. 531, 534–35 (2002) ("[M]uch like the compulsory nature of the legal process, mandating mediation rectifies power imbalances among the parties....").

[84] *See* Merrill Shields, *Mediation in State Government*, COLO. LAW. (Colo. Bar Ass'n, Denver, Colo.), Oct. 1997, at 19, 24 ("Dispute is best suited to litigation because client requires public, final, binding, adjudicated resolution (*e.g.*, for purposes of establishing precedent, appeal, utilizing available procedural safeguards).").

[85] *See* Carolyn D. Schwarz, *Unified Family Courts: A Saving Grace for Victims of Domestic Violence Living in Nations with Fragmented Court Systems*, 42 FAM. CT. REV.

and application of binding legal rights, the aggrieved party must be able to consult a litigation professional who operates separately and is not beholden to the opposing interest. And because such action may be initiated under mistaken facts or improper intent, and because an informed outcome demands thoughtful participation by both sides, the opposing party should be able to respond through a similarly separate legal advocate.

The experts that assist disputants within the litigation process must therefore operate separately, and be able to guide their clients from complaint to final decision without the approval of the opposing party. In contrast to the fundamental requirements of important legal rights discussed in the previous section or the methods by which they fulfill their duties in this process discussed in the next section, the conclusion in this section is simple and functional: litigation advocates must be capable of unilateral action in front of a powerful third-party decision-maker.

This conclusion is important to the overall point of this paper because advocates can assist disputants in negotiation-based processes that are functionally different from decision-based processes along all of the above criteria that require advocates to operate separately. Negotiation is a voluntary search for a mutual outcome by opposing interests.[86] The process is initiated by both disputants together and requires their continued and voluntary participation in order to function.[87] Instead of a debate in front of a powerful third-party decision-maker, this dialogue is empowered at all levels by both parties exploring their self-interests in concert.[88] So, while decision-based processes are only necessary when the parties cannot cooperate, negotiation-based processes are only possible when the parties are coordinating their actions. As a result, separate advocates in negotiation may be not only unwarranted but also obstructive.

304, 309 (2004) ("alternative dispute resolution, are only alternatives to a victim's unilateral right to adversarial litigation").

[86] *See* Cynthia Alkon, *The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs*, 2002 J. DISP. RESOL. 327, 347 (2002) (defining negotiation as "the process by which parties voluntarily seek a mutually acceptable agreement to resolve their common dispute").

[87] *See* John A. Folk-Williams, *The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights*, 28 NAT. RESOURCES J. 63, 72 (1988) ("Negotiation is a voluntary decisionmaking process in which the parties bargain directly, though not necessarily face to face, to reach an agreement that is capable of implementation.").

[88] *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 755 (1984) ("When people negotiate they engage in a particular kind of social behavior; they seek to do together what they cannot do alone.").

Disputants who seek individual assistance in a negotiation-based forum, therefore, misapply a role designed for decision-based processes when they hire separate advocates. However, as the next section demonstrates, the methods employed by these litigation-based advocates may be more obstructive to negotiation than the methods by which they become employed.

C. *Adversarial Court Procedures Require Zealously Independent Advocates*

While the basic contours of a decision-making body applying binding law present the foundational reasons for advocates to be independent, it is the philosophy of the forum that most visibly impacts the relationships among its advocates. This section will therefore shift the focus from the structure of the larger system to how the philosophy of the system affects the role of the advocate. As will be demonstrated below, the particular approach of the American justice system requires advocates to operate in a manner that is not conducive to negotiation; however, this approach originates from litigation and should not guide out-of-court dispute resolution.

Because the process by which the state imposes its power over conflicting narratives must conform to societal expectations to carry legitimacy,[89] the adjudicatory justice system is imbued with important values.[90] In meting out

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[89] Orna Rabinovich-Einy, *Beyond Efficiency: The Transformation of Courts Through Technology*, UCLA J.L. & TECH., Spring 2008, at 1, 12 (describing a change in "the way in which procedural rules are understood, from technical and dry instructions to important tools for promoting basic procedural values that are necessary for sustaining the legitimacy of the litigation process"); Albert Monroe, *Rebuilding Justice: A Review of The Collapse of American Criminal Justice, by William J. Stuntz*, 3 WM. & MARY POL'Y REV. 333, 345 (2012) ("Tom Tyler, a professor of law and psychology who has written at length about legitimacy, states that people accept adverse adjudication proceedings more readily if they feel that 'the court procedures used to handle their cases are fair.'").

[90] Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 IND. L.J. 301, 308 (1989) (stating that "[a]djudication involves the presentation of a dispute to a decisionmaker who has the authority to render a decision that is binding on the parties to the dispute" and describing the characteristics necessary for the process to be fair); Justice William H. Erickson, *The History of the Tripod of Justice*, 64 MIL. L. REV. 79, 79 (1974) ("Fundamental fairness and verity in the truth-finding process are essential to our system of justice."); Charles M. Sevilla, *Criminal Defense Lawyers and the Search for Truth*, 20 HARV. J.L. & PUB. POL'Y 519, 519 (1997) ("A system of justice seeking only factual truth without regard to fairness or other important values would not be a just system."); Michael A. Newton, *Should the United States Join the International Criminal Court?*, 9 U.C. DAVIS J. INT'L L. & POL'Y 35, 37 (2002) (stating that, "the only true justice is a truth-based justice, a fair system of justice that bases its judgment on truth and facts..."); Stone v. Powell, 428 U.S. 465, 523 (1976) (Brennan, J., dissenting) (rhetorically quoting the majority's assertions that "the 'ultimate goal' of the criminal justice system is 'truth and justice.'" Stone, 428 U.S. at 491 n. 30).

order, truth, and fairness, court systems place specific expectations and restrictions on the advocates who personally assist disputants in litigation.[91] Because ideas such as truth and fairness are important to the justice system, court procedures are designed around these values, and because these values are subjective and inconsistent at times,[92] court procedures can vary among societies.

For example, a litigation system focused entirely on the search for an objective truth would remove any impediments to the decision-maker's access to information. Such a process is exemplified by the inquisitorial justice system in which the judge dominates the fact-finding process—actively investigating the evidence and candidly interviewing witnesses prior to trial.[93] Critics of this approach argue that an adjudicatory process conducted entirely

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[91] Shirin Chahal, *Balancing the Scales of Justice: Undercover Investigations on Social Networking Sites*, 9 J. TELECOMM. & HIGH TECH. L. 285, 305 (2011) ("In the realm of legal ethics, all states have adopted rules of professional conduct for lawyers similar to the standards promulgated by the American Bar Association in its Model Rules of Professional Conduct.").

[92] *See* G. Kristian Miccio, *Giles v. California: Is Justice Scalia Hostile to Battered Women?*, 87 TEX. L. REV. 93, 95 (2009) ("Unlike the U.S. Supreme Court, New York's appellate courts recognize the tension between 'truth' and our conceptions of 'fundamental fairness.' The courts have consistently held that a trial is *not* a search for the truth, but rather a test of what the prosecution can prove and what reasonable doubt the defense can raise. New York has laid bare the truth here, pardon the pun. A trial is really a search for reasonable doubt, and truth may, indeed, be a casualty of this process. The salient question is whether 'truth' and 'fairness' are incompatible or discordant principles within our adversarial process."); R. Jason Richards, *Richards v. Jefferson County: The Supreme Court Stems the Crimson Tide of Res Judicata*, 38 SANTA CLARA L. REV. 691, 742 (1998) ("Truth and justice is a subjective notion; it is intimately personal. As one commentator put it, 'The process of litigation is a product of the mind.'") (quoting Jon Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1646 (1985)).

[93] Sward, *supra* note 90, at 313 ("[T]wo essential elements of inquisitorial adjudication are: first, that the judge is primarily responsible for supervising the gathering of evidence necessary to resolve the issue; and, second, that the decisionmaker is not, therefore, merely a receptor for information at a neatly packaged trial, but is, instead, an active participant."); Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1301 (2013) ("The classic inquisitorial model, historically associated with civil-law countries, empowers a judicial officer, an investigating magistrate, to proactively frame the issues, investigate a case, and question witnesses. The parties can thus be much more passive, suggesting leads and lines of inquiry but not themselves recruiting and questioning the witnesses."); Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 696–97 (2010) ("[I]n inquisitorial systems, judges and police interview witnesses well before trial...").

within the mind of the judge would be unduly influenced by the judge's early conclusions and personal biases.[94] As a reaction to the authoritarian power of judges conducting both investigation and decision-making,[95] an alternative "adversarial" model arose in which the decision-maker remains impassive and allows the disputants to control the investigation and presentation of evidence.[96] Because the fairness of any adjudicatory system is based primarily on the decision-maker's ability to be impartial in weighing the conflicting narratives,[97] participants perceive the adversarial process as fairer than its inquisitorial counterpart.[98] Though the inquisitorial criticism of the adversarial system suggests that relying on party presentation of evidence leads to distortions and promotes subjective fairness over truth and accuracy,[99]

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[94] Michael Asimow, *Popular Culture and the Adversary System*, 40 LOY. L.A. L. REV. 653, 666 (2007) ("Harvard Professor Lon Fuller famously criticized the inquisitorial system on neutrality grounds. Fuller argued that a judge who is involved in framing the issues and choosing witnesses prior to the trial would decide prematurely which side was correct and downgrade evidence to the contrary. In contrast, Fuller argued, the passive judge in an adversarial trial is likely to remain neutral until all the evidence is in."); Fabio López-Lázaro, *"No Deceit Safe in Its Hiding Place": The Criminal Trial in Eighteenth-Century Spain*, 20 LAW & HIST. REV. 449, 458 (2002) ("Nineteenth-century reformers like Sagasta were fond of portraying old-fashioned courts as despotic because the judges had both investigative and adjudicatory powers.").

[95] *See e.g.*, Stephan A. Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 724–25 (1983).

[96] Unlike inquisitorial civil law judges, who may instruct parties to produce documents in their possession, examine witnesses, and appoint experts, the paradigmatic common law court is passive and relies exclusively on the adversary process. Only the litigants, seeking to convince the court, are supposed to provide the court with the necessary information. *See* Eran B. Taussig, *Broadening the Scope of Judicial Gatekeeping: Adopting the Good Faith Doctrine in Class Action Proceedings*, 83 ST. JOHN'S L. REV. 1275, 1297 (2009).

[97] Sward, *supra* note 90, at 308 ("All systems of adjudication that could be characterized as 'fair' must have certain additional features.... First, the decisionmaker must be impartial."); Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 WAKE FOREST L. REV. 671, 674 (1997) ("In the ideal model of the adversarial system, impartial decisionmakers—judge, jury, or some combination thereof—render decisions based on evidence presented by competent advocates zealously representing their clients' interests in accordance with established rules."); *see also* Tumey v. Ohio, 273 U.S. 510, 510 (1927) (finding that a "judge having a direct, personal, substantial interest in convicting [a criminal defendant] is a denial of due process of law").

[98] JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 73 (1975) (describing an empirical study comparing adversary and inquisitorial systems and finding that parties in the adversary system are more satisfied overall, think they are "treated more humanely and with greater dignity," and believe adversary procedure to be relatively fair).

[99] Paul L. Seave, *And Nothing but the Truth: A Review of Judge Rothwax's "Guilty: The Collapse of Criminal Justice"*, 28 PAC. L.J. 533, 540 (1997) ("[O]ur adversarial system

empirical studies have shown that the adversarial system is better equipped to counteract the decision-maker's personal biases[100] and tendency to decide a matter before all of the evidence has been presented.[101]

The theory behind the adversarial model of adjudication is that competition between stakeholders in presenting evidence in front of an impartial decision-maker will produce a thorough, well-wrought, and fair decision.[102] Arguably, this dialectic of conjecture and refutation will filter out inaccuracies, debate the merits of each perspective, and point to the best approximation of the truth.[103] Thus, not only is unrestrained advocacy protective of the impartiality of the process,[104] it also arguably produces ideal outcomes in decision-based processes.[105]

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in its attention to fairness has spawned excesses—most notably, an excessive tolerance of efforts by the contestants to distort the truth.") (quoting JUDGE HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 130 (1996)); Stephen A. Saltzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L. REV. 647, 651 (1986) ("The American adversary system is misdescribed as a search for truth..."); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 56 (1991) ("Fairness and respect for client individuality play an equal part, even though full assertion of client rights may interfere with truth-seeking.").

[100] Asimow, *supra* note 94, at 667 (describing Thibaut and Walker's experiment which concluded that "[w]hen the judge was not 'biased,' the conviction rates were the same whether an adversarial or inquisitorial trial occurred. Where the judge was biased, however, the judge was more likely to convict the defendant in an inquisitorial rather than an adversarial trial.").

[101] As a case is presented, the adversary mode apparently counteracts judge or juror bias in favor of a given outcome and thus indeed seems to combat, in Fuller's words, a "tendency to judge too swiftly in terms of the familiar that which is not yet fully known." Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 383 (1978).

[102] Ann Southworth, *Redefining the Attorney's Role in Abusive Tax Shelters*, 37 STAN. L. REV. 889, 910 (1985) ("The adversarial model of justice postulates that an adversarial proceeding, in which both parties to a conflict advocate their own interests before an impartial judge, produces a record as complete and results as fair as any to be expected from formal adjudication.").

[103] Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 595 (1985) ("The premise is that 'truth' or the 'right' result is attainable through competitive presentations of relevant factual and legal considerations. Paralleling Karl Popper's concept of scientific rationality, the theory assumes that knowledge will emerge through a dialectic of conjecture and refutation.").

[104] Fuller, *supra* note 101, at 382 ("In a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate. This becomes apparent when we contemplate the nature of the task assumed by any arbiter who attempts to decide a dispute without the aid of partisan advocacy. Such an arbiter must undertake, not only the role of judge, but that of representative for both of the litigants.").

[105] Rhode, *supra* note 26, at 596 ("The institution of advocacy is not a concession to the frailties of human nature, but an expression of human insight in the design of a social framework

Because partisan advocacy is the engine driving the adversarial process,[106] legal structures based on this model encourage an active role for the advocate that is distinct from the passive role of the judge.[107] With an adversarial client-focused system rooted in values such as competition and individualism,[108] the role for attorneys traditionally favored in the American justice system is the zealous advocate.[109] Note that the theoretical foundation for zealous advocacy is tied directly to the adjudicatory system, rendering such an approach to be superfluous and perhaps harmful to non-adjudicatory processes.

The ideal of zealous advocacy involves the aggressive, unrestrained assertion of individual perspectives, arguments, and rights.[110] Because the

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within which man's capacity for impartial judgment can attain its fullest realization."); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160–61 (1958) (arguing that a decision maker can best reach an impartial judgment when the issues have been presented with "intelligent and vigorous advocacy").

[106] Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?,* 44 VAND. L. REV. 45, 54 (1991) ("Partisan advocacy enables judges and juries to see controversies from the litigants' perspectives; it ensures that fact finders will not overlook obscure but relevant information.").

[107] Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 425 (1997) ("Current legal ethics codes assume a clear distinction (based on our adversary system) between the advocates and the neutral, impartial and passive decision-maker who operates at arms-length from the parties.").

[108] SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 108 (1996) ("The American social structure and values foster the free market and competitive individualism..."); Herbert Jacob, *Courts and Politics in the United States*, *in* COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE 16, 29 (Herbert Jacob et al. eds., 1996) ("[T]he legal system in the United States reflects core values of the nation's political and legal tradition, particularly an emphasis on individual rights, a focus on constitutionalism of proposed actions, limited government, and aspirations of egalitarianism."); Carolyn Jin-Myung Oh, *Questioning the Cultural and Gender-Based Assumptions of the Adversary System: Voices of Asian-American Law Students*, 7 BERKELEY WOMEN'S L. J. 125, 126 (1992) ("The American values of free-market competition, decentralized and minimized government intervention, and laissez-faire economics are mirrored in the adversary process.").

[109] Paula Schaefer, *Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor's Touchstone*, 38 FLA. ST. U. L. REV. 251, 253 (2011) ("In the United States, lawyers, commentators, and courts understand "zealous advocacy" to be the lawyer's highest duty..."); Zacharias, *supra* note 106, at 54 ("[T]he assumption is that aggressive, competitive lawyering, guided exclusively by client interests, produces appropriate results.").

[110] MODEL RULES OF PROF'L CONDUCT Preamble (AM. BAR ASS'N 1983) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system"); *id.* at r. 3.1 cmt. 1 ("The advocate has a duty to use legal procedure for the fullest benefit of the client's cause."); Carol Rice Andrews, *Ethical Limits on Civil Litigation*

thoroughness and fairness of the adjudication is measured in the degree to which opposing advocates clash in the investigation and presentation of evidence, maximal advocacy in front of an impassive judge theoretically leads to an optimal decision.[111] Zealous advocacy is therefore designed to be the foundation of a superior decision-making process. Though zealousness is intended to benefit the adjudicatory process,[112] the concept of zealousness also creates benign guidance for the advocates that operate within it. While a system that requires restraint in the enforcement of social norms would have to define the socially acceptable amount of effort in applying these norms, unrestrained zeal is simple[113] and uniformly regulates conduct through counteracting checks and balances.[114] This simple and uniform ethic is beneficial within a system in which justice depends on equal treatment under the law, but would be unnecessary in a direct interaction between disputants informally applying their personal sense of fairness. As a further measure of the "purity" of the adversarial system,[115] the superseding loyalty owed by

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Advocacy: A Historical Perspective, 63 CASE W. RES. L. REV. 381, 386 (2012) ("Zealous advocacy requires competence, confidentiality, and loyalty, but to most observers, it means something more. Zealous advocacy suggests a push for excellence. Zealous advocacy, to some observers, requires a strong desire to win and a willingness to 'do all' to accomplish the client's goals. It suggests a primacy of the client's interests, perhaps above all others.").

[111] Mark A. Hall, *Rationing Health Care at the Bedside*, 69 N.Y.U. L. REV. 693, 734-35 (1994) ("For legal ethics, strict client devotion is said to be demanded by the adversarial system of adjudication, which is designed to arrive at the optimal determination of justice via a contest of competing extremes. The lawyer's single-minded pursuit is counterbalanced by the opposing lawyer's equally zealous advocacy and the neutral role that the judge and jury play as the ultimate arbiters of the merits of the competing arguments.").

[112] Andrews, *supra* note 110, at 427 ("Ethical Consideration 7-19 explained the rationale for zealous advocacy: 'the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments.'").

[113] Schaefer, *supra* note 109, at 288 ("Zealous advocacy's great advantage is that it is simple.").

[114] Zacharias, *supra* note 106, at 55–56 ("Adversarial process...creates a system of checks and balances. The attorneys keep an eye on one another and on the judge to make sure that they all perform their assigned roles in proper and ethical fashion.").

[115] Frederick R. Franke, Jr., *Perfect Ambiguity: The Role of the Attorney in Maryland Guardianships*, 7 MD. J. CONTEMP. LEGAL ISSUES 223, 234 (1996) ("Under a pure adversarial model, the attorney for a guardian owes the guardian, not the ward, his or her undivided loyalty. If a guardian informs the guardian's attorney that the guardian had misappropriated funds, the attorney has no duty to the ward under pure adversarial rules."); Gerald W. Boston, *Liability of Attorneys to Nonclients in Michigan: A Re-Examination of* Friedman v. Dozorc *and A Rule of Limited Liability*, 68 U. DET. L. REV. 307, 353–54 (1991) ("While one commentator advocates that liability for negligence to third parties should never be permitted because a no-duty rule would force third parties to retain their own counsel who can represent their interests with

attorneys to their clients prevents any of the parties' viewpoints from being overshadowed by the advocates' own personal values[116] or allegiance to the court.[117] This narrow focus on the client is important when an advocate speaks as a representative of the client and the judge issues a binding decision based on those representations, but would be less important if the client controlled the conduct and outcome of the process, as in negotiation-based processes.

As a result of the clash of perspectives required in adjudication, the checks and balances creating uniform treatment under the law, and the need to focus on respective clients' voices in a process in which they may not speak, this advocacy role is built on unhindered competition between opposing advocates.[118] Any overarching loyalties between adversaries would reduce effectiveness and call into question the propriety of the process.[119] As a result, close relationships between adversaries would seem to obstruct adversarial litigation.[120] Thus, the

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undivided loyalty and would result in better lawyering, that approach seems most appropriate in the pure adversarial context of litigation.").

[116] Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 963–64 (1991) ("In the ideal adversary system reflected by the ethical codes, the lawyer does not sit in judgment of the client's cause.").

[117] Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39, 76 (1989) ("Lawyers, frankly, are not obligated to serve as officers of the court in any meaningful sense. Whether in the ethical or nondisciplinary context, the law applicable to lawyers leans conclusively, if not exclusively, in favor of the lawyer's duty to the client.")

[118] Oh, *supra* note 108, at 126 (noting that "the American legal model, including the 'rules of the game,' fosters competition between largely autonomous and self-interested, zealous advocates in a winner-take-all scheme"); Symposium, *Teaching a New Paradigm: Must Knights Shed Their Swords and Armor to Enter Certain ADR Arenas?*, 1 CARDOZO ONLINE J. CONFLICT RESOL. 3 (2000) [hereinafter *Teaching a New Paradigm*] ("The old paradigm was that a lawyer's duty of zealous advocacy required an exclusively competitive ethic.").

[119] This is the rationale behind MODEL RULES OF PROF'L CONDUCT R. 1.10 (AM. BAR. ASS'N 2014), which prevents two attorneys with overarching loyalties to the same firm from representing opposing parties.

[120] *See, e.g.*, Stacy DeBroff, *Lawyers As Lovers: How Far Should Ethical Restrictions on Dating or Married Attorneys Extend?*, 1 GEO. J. LEGAL ETHICS 433 (1987) (despite the well-reasoned recommendation in this note, ethical rules do not address situations in which opposing attorneys are engaged in an emotional relationship); *accord* Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 WASH. L. REV. 823, 901 n.126 (1986) (citing People v. Jackson, 167 Cal. App. 3d 829, 832–33 (1985) where "the court reversed a conviction of assault with intent to commit rape because defense counsel was dating the prosecutor.... 'Such an apparently close relationship between counsel directly opposing each other in a criminal prosecution naturally and reasonably gives rise to speculation that the professional judgment of counsel as well as the zealous representation to which an accused is entitled has been compromised.'")); *see* Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 235–36 (2d Cir. 1977) (citing Canon 4 as a basis for disqualifying the attorney because

adversarial system of justice hinges on independence between opposing advocates.[121]

Like the previous sections that reveal the link between adjudication of legal rights and a necessary disconnect between opposing advocates, this section demonstrates that advocates are required to be independent in the context of litigation. Once again, the key insight of this analysis is that zealousness, like independence and separateness, only makes sense in the context of litigation.

D. *Divorcing Advocacy from Adjudication*

The link between the advocate's zealous independence and the process of adjudication is important to identify for a number of reasons. First, advocacy is useful to disputants in contexts outside of the full and formal litigation of legal rights, making zealous combativeness potentially unnecessary in those contexts. Just as advocates trained in the law can guide litigants through court procedures, so can advocates trained in the art of negotiation guide individual disputants through dispute resolution.[122] And, because effective negotiation requires knowledge of complex theories[123] and involves nuanced skill,[124]

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of a close relationship with opposing counsel). *See also* Susan R. Martyn, *Are We Moving in the Right Dimension? Sadducees, Two Kingdoms, Lawyers, and the Revised Model of Professional Conduct*, 34 VAL. U. L. REV. 121, 158 n.187 (1999) ("Attorneys are expected to maintain personal relationships with other attorneys, but must be sensitive to the threat to independent judgment and the appearance of impropriety when an intimate relationship exists with opposing counsel or others involved in the proceedings.").

[121] George Hampel & Jonathan Clough, *Giannarelli v. Wraith*, 24 MELB. U. L. REV. 1016, 1021 (2000) ("The adversarial system, it is argued, relies to a large extent on counsel exercising independent judgment in the conduct of a case.").

[122] Lucy S. McGough, *Protecting Children in Divorce: Lessons from Caroline Norton Edward S. Godfrey Scholar-in-Residence Lecture*, 57 ME. L. REV. 13, 37 n.83 (2005) ("Collaborative law is...a particularly useful option for a parent who is reluctant to mediate because he or she fears the other spouse, feels disempowered, and needs the benefit of an advocate and adviser in the room as settlement negotiations proceed.").

[123] *See, e.g.*, Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789 (2000); *accord* John Lande, *A Framework for Advancing Negotiation Theory: Implications from A Study of How Lawyers Reach Agreement in Pretrial Litigation*, 16 CARDOZO J. CONFLICT RESOL. 1, 2 (2014) ("To provide a snapshot of contemporary legal negotiation theory, this Article analyzes nine law school negotiation textbooks.") (citation omitted). *See also* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1983).

[124] Roy J. Lewicki, *Seven Teaching Challenges for Business School ADR*, 16 ALTERNATIVES TO HIGH COST LITIG. 113 (1998) ("[N]egotiation is not one single skill; rather, effective negotiation is a complex collection of skill elements that entails aspects of

professionals trained in negotiation provide benefits within negotiations that extend beyond mere personal support.

Second, the connection between attorney independence and litigation is important because not every disputant who seeks the legal insights of an attorney actually desires a fully litigated outcome.[125] Attorneys often address situations that, after analyzing the legal rights and likely outcomes of litigation, they determine are not appropriate for court action.[126] This reality is apparent in the vast majority of legal cases that settle prior to trial, challenging the overall appropriateness of the adversarial paradigm [127] especially as applied to pre-litigation processes. [128] And, third, the link

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planning, strategizing, advocacy, communication, persuasion, and cognitive packaging and repackaging of information.").

[125] Theresa J. Pulley Radwan, *Domino Effect: The Continued Existence of Liability for Fraud in Bankruptcy Despite Good-Faith Settlement by the Honestly Unfortunate Settlor*, 53 CATH. U. L. REV. 81, 123 (2003) ("[T]he courts fail to consider the realities of settlement and the desire of the parties to avoid litigation."). *E.g.*, Note, *Daring the Courts: Trial and Bargaining Consequences of Minimum Penalties*, 90 YALE L.J. 597, 606 (1981) ("The legal debate over negotiated settlements has tended to focus on the desirability of pretrial bargaining apart from considerations of cost to the parties or the possible desire of parties to avoid trial for reasons other than cost saving."); *accord,* Robert E. Couhig et. al., Mcdermott v. Amclyde*: A Path Towards a Proportionate Fault Rule in Section 905 (b) Actions*, 19 TUL. MAR. L.J. 283, 299 (1995) (citing a United States Supreme Court decision that acknowledges "[t]he parties' desire to avoid litigation costs, to reduce uncertainty, and to maintain ongoing commercial relationships").

[126] Michele Corvi, *Overcoming Challenges in Counseling Divorce Clients, in* STRATEGIES FOR FAMILY LAW IN CALIFORNIA (2011) ("I always explain the costs of litigation to my clients at the beginning of the case, and ask them whether litigating is worth it, because you could be fighting over an asset that is worth very little money. At the end of the day, if you are going to be spending more in attorney's fees than the sum at which the assets in the case are valued, litigation is probably not appropriate."). *See, e.g.*, Terry Ann Halbert & Lewis Maltby, *Reference Check Gridlock: A Proposal for Escape*, 2 EMP. RTS. & EMP. POL'Y J. 395, 414 n.72 (1998) (recounting a phone interview in which "plaintiffs' attorney Paul Tobias acknowledged that, while his office can provide certain services—writing letters, obtaining small settlements, for example—in about 95% of cases 'going to court is not appropriate because it isn't a practical solution'").

[127] Rhode, *supra* note 102, at 599 ("Since close to 90% of all civil cases are settled prior to trial, and relatively little of lawyers' advocacy occurs in the presence of impartial adjudicators, the adversary paradigm offers an inadequate foundation for the partisanship role.") (citation omitted).

[128] *Teaching a New Paradigm*, *supra* note 118 ("The old paradigm was that a lawyer's duty of zealous advocacy required an exclusively competitive ethic.... But we have known for a long time that approximately ninety percent of the cases settle before trial. Thus, the question becomes, 'What ethic should govern the behaviors of the lawyers in the pre-trial processes, in which the vast majority of cases are resolved.'"). *See generally* Wayne D.

between zealous advocacy and litigation is important because the ethos of zealousness was designed under a legal atmosphere that fostered amicable relations among opposing attorneys. This last point will be demonstrated and explored in the next part.

To conclude this part, inherent aspects of the application of binding law, unilateral court action, and adversarial adjudication all specifically require that opposing advocates operate independently of each other. However, advocacy may be useful outside of the context of court actions and, as the following subpart reveals, independence between opposing advocates can be obstructive to non-legal advocacy.

III. THE PRISONER'S DILEMMA, NEGOTIATION, AND ADVOCACY

While the previous subpart demonstrated that independence between advocates is only necessary in the context of courtroom litigation and legal advice, this section will demonstrate that such independence can be counterproductive in other contexts and detrimental to the broader system. This point will be explained with a game theory model that addresses cooperation-competition dynamics and then illustrated through the impact of relationships on negotiation-based and adjudication-based advocacy.

A. *The Prisoner's Dilemma and Relationships Between Opposing Advocates*

Because relationships between opposing advocates can be complicated and nuanced on the individual level, the effect of independence on advocate behavior in general will be best examined through the game theory model of the Prisoner's Dilemma. By distilling conflict between autonomous, self-interested decision-makers into simple choices with quantifiable outcomes, game theory studies strategy in light of opposing strategies (i.e., "What is the optimal response to the opponent's optimal decision?").[129] The Prisoner's Dilemma is an application of game theory that explores incentives between two individuals who can either cooperate or compete with each other. This

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Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978).

[129] Jonathan R. Cohen, *Reasoning Along Different Lines: Some Varied Roles of Rationality in Negotiation and Conflict Resolution*, 3 HARV. NEGOT. L. REV. 111, 112 (1998) ("[G]ame theory, by definition, concerns *interdependent* decision making."). *See, e.g.*, Charles J. Stiegler, *Offering Monetary Rewards to Public Whistleblowers: A Proposal for Attacking Corruption at Its Source*, 9 OHIO ST. J. CRIM. L. 815, 820 n.16 (2012) ("This is a simple definition of game theory, which posits that a rational person in deciding how to act will consider the probable reactions of others; he will, in other words, act strategically.").

well-respected model illustrates four possible outcomes of this dynamic: the two players both cooperate and create mutual gains, the two players both compete and do not create mutual gains, the first player cooperates and is taken advantage of by the competitive opponent, or the first player competes to take advantage of the cooperative second player. Ranked from best to worst, the order of these outcomes is: competing when the opponent cooperates, mutual cooperation, mutual competition, and cooperating when the opponent competes. Rather than being a merely abstract scheme, the Prisoner's Dilemma offers an omnipresent observation of strategic behavior in conflicts—that being protective, aggressive, and distrustful (competitive) garners disproportionate gains over an opponent who is open, honest, and accommodating (cooperative). And, while a multifaceted human interaction involves more than one binary choice by each side, such realistic dynamics are composed of individual decisions and underlying strategies that are either cooperative or competitive.

Though the choice refined from the Prisoner's Dilemma model appears to be subject to the personalities and value systems of the players involved, economists would point out that there is only one rational choice under this set of incentives: competition. This conclusion is apparent in a comparison between each of an individual's outcomes in light of the opponent's choice. If the opponent cooperates, the individual will receive a better outcome by using competitive moves to obtain marginal benefits, and if the opponent competes, the individual will receive a better outcome through the protection of mutually competitive tactics. Not only does each player receive a better outcome by competing regardless of the opponent's move, but each player also knows that the opponent is facing the same incentives. As a result, the only rational move under a single game is to compete.

However, the Prisoner's Dilemma model offers another more optimistic insight. While single-shot interactions promote competitive moves, if the game were to be repeated indefinitely, then the incentives shift.[130] When both players know that the game will repeat without foreseeable end, mutual cooperation offers infinitely recurring positive gains while competitive moves offer marginal gain in one interaction, but then a descent to repeated null gains

[130] Francis Fukuyama, *Differing Disciplinary Perspectives on the Origins of Trust*, 81 B.U. L. REV. 479, 485–86 (2001) ("The reason why tit-for-tat works as a solution to the prisoner's dilemma can be understood in commonsensical non-game theoretic terms. If one faces a decision of trusting another person whom one does not know and will never see again, one is likely to be cautious because there are insufficient grounds for trust. On the one hand, repeated interaction allows people to build reputations, either for honesty or betrayal. Those in the latter category will be shunned, while those in the former category will gravitate toward working with one another. Honesty is therefore (usually) the best policy.").

through retaliatory competitive moves. Thus, when the promise of future benefits through ongoing cooperation looms over the Prisoner's Dilemma, the rational move for each player is to cooperate.

The lesson of the Prisoner's Dilemma is that the duration of the relationship between opposing interests can control the tension between cooperation and competition. Practical examples of this lesson include therapists who are better able to elicit the trust and openness needed for psychological improvement by consistently counseling the same clients over time[131] and savvy businesspeople who foster long-term interactions for the benefits that come with mutual reliance.[132] The flipside of this dynamic occurs when dictatorial regimes rotate prison guards to prevent captors from developing sympathy with captives[133] and armies engaged in World War I trench warfare learned to rotate troops to mitigate the placidity that developed from reciprocal "live and let live" actions.[134] Therefore, systems that require competitive behavior should limit reciprocity between adversaries and systems that desire cooperation should be built on continuous interaction.

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[131] John C. Norcross & Michael J. Lambert, *Evidence-Based Therapy Relationships, in* PSYCHOTHERAPY RELATIONSHIPS THAT WORK: EVIDENCE BASED RESPONSIVENESS (John C. Norcross ed., 2d ed. 2011) ("The results of these 20+ meta-analyses converge into a series of research-supported conclusions with important implications for psychotherapists and clients alike: The therapy relationship makes substantial and consistent contributions to patient success in all types of psychotherapy studied (for example, psychodynamic, humanistic, cognitive, behavioral, systemic). The therapy relationship accounts for why clients improve (or fail to improve) as much as the particular treatment method. Practice and treatment guidelines should address therapist qualities and behaviors that promote the therapy relationship.") (citation omitted).

[132] K. Vinayagamoorthy, *Apologies in the Marketplace*, 33 PACE L. REV. 1081, 1085 (2013) ("Business relationships matter immensely in a variety of commercial settings. In these situations, parties place value on their business relationship that is independent and in addition to the pecuniary benefits they gain from exchanging with each other.").

[133] Lawrence G. Baxter, *"Capture" in Financial Regulation: Can We Channel It Toward the Common Good?*, 21 CORNELL J.L. & PUB. POL'Y 175, 196 (2011) ("[T]ransference is the reason that dictatorial regimes rotate their prison guards—lest these guards begin to develop too great a sympathy for their prisoners.").

[134] *See, e.g.*, ROBERT AXELROD, THE EVOLUTION OF COOPERATION 73–87 (1984) (describing cooperation that developed over time between soldiers in opposing trenches and how military leaders attempted to mitigate this cooperation by rotating troops); *accord*, Douglas W. Allen, *Compatible Incentives and the Purchase of Military Commissions*, 27 J. LEGAL STUD. 45, 54 n.30 (1998) ("Gordon Tullock, *Methodological Individualism under Fire*, 8 J. ECON BEH & ORG 627 (1987), provides another striking example. Apparently it is well known in the military that most soldiers in twentieth-century battles failed to fire their weapons. Tullock interprets this as a Prisoner's Dilemma application since firing a weapon draws attention to your position and intentions and, therefore, increases the chance of being shot at. Hence the dominant strategy is to sit quietly in a protected spot and wait.").

B. *Application of Prisoner's Dilemma Lessons to Types of Advocacy*

These dynamics are present in the requirements and relationships of advocates in both litigation and negotiation. The differing goals of these processes thereby lead to different relationship structures that are ideal for advocates in each process.

As a process that relies on adversarial efforts of opposing attorneys to produce a thorough and well-argued decision, litigation must encourage advocates to be competitive.[135] Collusive settlement negotiations or tit-for-tat accords intended to avoid the hassle of adjudication would work to the detriment of clients with valid legal rights.[136] If the decision to pursue legal action was based on litigation costs incurred for both sides, (i.e., litigation would not be pursued if the process would cost both sides more than it would benefit either) wrongdoers would be free to cause damage that was just under the parties' combined litigation expense.[137] Adjudication of legal rights is thereby best served by strong attorney-client relationships and limited attorney-attorney relationships.[138] A strong relationship between opposing

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[135] Phyllis E. Bernard, *The Administrative Law Judge as a Bridge Between Law and Culture*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 34 (2003) ("Justice, fairness, a re-balancing of power, transparency and accountability are typically seen as the best products of a formal adjudicatory process. Litigation achieves these results through the competitive clash of attorneys...."); Ann Southworth, *Redefining the Attorney's Role in Abusive Tax Shelters*, 37 STAN. L. REV. 889, 910 (1985) ("The adversarial model of justice postulates that an adversarial proceeding, in which both parties to a conflict advocate their own interests before an impartial judge, produces a record as complete and results as fair as any to be expected from formal adjudication.").

[136] Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129, 177 (2015) ("When participation in an out-of-court dispute resolution system (whether an aggregate settlement, mandatory arbitration, or corporate settlement mill) bars access to private litigation, parties deserve heightened process to protect their legal rights."). *See, e.g.*, Sally Lloyd-Bostock, *Alternative Dispute Resolution and Civil Justice Reform: Is ADR Being Used to Paper Over Cracks?*, 11 OHIO ST. J. ON DISP. RESOL. 397, 401–02 (1996) ("Mediation can place very strong psychological pressure on claimants to settle for less than the amount a court would award. In what sense is this a 'good thing?' It is clear that a priority for the Health Service is to reduce the costs to itself of medical negligence claims. But, should the courts systematically support low settlement and the undermining of legal rights?").

[137] Griffith, *supra* note 39, at 353 ("In other words, everyone pays the wasteful $10, the aggregate effect of which may be to make it unfeasible to assert claims worth less than $10. Under this example, tortfeasors, breachers of contract, and other wrongdoers may freely impose up to $10 worth of harm because, below that threshold, the victim will not seek to enforce her legal rights.").

[138] John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 232 (1983) ("The

advocates is therefore antithetical to the requirements and goals of litigated interactions.[139]

Naturally, the adjudicatory system creates pro-competition Prisoner's Dilemma dynamics between opposing attorneys by limiting the reciprocity created by ongoing interaction. Because the "appearance of impropriety" between chummy opposing attorneys was overly subjective and prone to abuse in application,[140] legal ethics rules limit relationships between adversaries by forbidding attorneys in one firm from representing opposing parties.[141] More importantly, the pro-competition dynamic results from attorneys operating independently, and the effect this has on the manner in which clients hire and pay for them. Because they choose attorneys separately and are each under incentive to choose an attorney who will "win" the litigation,[142] disputants have Prisoner's Dilemma incentives to choose aggressive attorneys, and attorneys experience financial and reputational incentives to enhance conflict rather than resolve it.[143] Furthermore, because attorneys operate solely on the

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possibility of collusive settlements grows in direct proportion to the attorney's 'independence' from his client.").

[139] Jeffrey Krivis, *The Truth About Using Deception in Mediation*, 20 ALT. TO HIGH COST LITIG. 121, 121 (2002) ("While candor and honesty are preferred when parties are concerned about continuing relationships, it is unrealistic to expect litigators to be candid when the goal is to get as much as they can for their clients.").

[140] Hejmanowski, *supra* note 41, at 903 ("One problem with the appearance-of-impropriety standard is the issue of who ought to judge the appearance of impropriety.").

[141] *See* MODEL RULES OF PROF'L CONDUCT r. 1.10 (AM. BAR ASS'N 1983).

[142] Griffith, *supra* note 39, at 352 ("Clients want to win. Because clients pay lawyers to win, and because prestige in the legal profession is often measured by the ability of lawyers to win, lawyers are motivated by profit and prestige, sometimes overwhelmingly, to win."). *See, e.g.*, Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 18 (1998) ("Clients value winning, not zealous advocacy for its own sake.").

[143] Gary Mendelsohn, *Lawyers as Negotiators*, 1 HARV. NEGOT. L. REV. 139, 139 (1996) ("Consciously or not, lawyers may prolong their clients' conflict for financial or reputational reasons."). *See, e.g.*, William G. Hyland Jr., *Attorney Advertising and the Decline of the Legal Profession*, 35 J. LEGAL PROF. 339, 345–46 (2011); *accord*, John A. Devault, III, *Guess What, You're Not Ticked Off at the Bar, But...*, 70 FLA. BAR J. 12, 12–14 (1996) ("I believe that the current unpopularity of lawyers has been brought about by increased commercialism of the profession, including misleading and distasteful advertising, and by the arrogant and aggressive behavior of lawyers toward each other, toward their clients, and toward others involved in the litigation process."). *See,* Mary Whisner, *The 4-1-1 on Lawyer Directories*, 106 LAW LIBR. J. 257, 265 (2014) ("Lawyers in private practice and law firms have incentives to have good profiles so that clients can find them and hire them."). *See also,* Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 186–87 (2008) ("Yellow page and media advertisements, for example, frequently characterize lawyers' characteristics (e.g.,

legal fees and goodwill from their clients, each attorney must focus entirely on the needs of their respective client to maintain employment.[144] As a system that is best served by clashes between opponents, the legal system has rightly structured independence between advocates to incentivize competition in attracting, retaining, and fighting for clients.

However, in terms of cooperation-competition dynamics, negotiation is a fundamentally opposite process from litigation. While both involve a confrontation of opposing interests, litigation is a contest of perspectives while negotiation is a synthesis of perspectives. As a process defined by voluntary decision-making, negotiation only results in a productive outcome when the participants entice each other into an agreeable exchange.[145] Because the process is composed of free disclosures of information, alternating proposals, and the mutual coming together of the participants, negotiation is an inherently cooperative endeavor. Under the Prisoner's Dilemma analysis in the above subsection, this cooperative orientation would indicate that the ideal relationship between negotiators is an ongoing interaction.

Basic characteristics and accepted observations support the idea that a continuous relationship between adversaries enhances the negotiation process. Ongoing relationships allow opponents to build the trust that supports cooperative exchanges.[146] Not only do relationships enhance comfort, but the assurance of future interaction will deter behaviors that would sour the relationship[147] and allow cooperators to gravitate together, identifying and

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'aggressive,' 'pit bull,' 'heavy hitter') ...as a means of establishing the lawyers' competence and quality.").

[144] Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529, 1552 (1995) ("If clients have meaningful choice to continue with their present attorney or to choose a new attorney (i.e., sufficient financial resources, information, experience, and lack of complete legal vulnerability), those clients are, in turn, able to influence—as distinguished from determine—their attorney's conduct, the quality of her work, and the outcome achieved.").

[145] Menkel-Meadow, *supra* note 88, at 755 ("When people negotiate they engage in a particular kind of social behavior; they seek to do together what they cannot do alone.").

[146] R. William Ide III & Douglas H. Yarn, *Public Independent Fact-Finding: A Trust-Generating Institution for an Age of Corporate Illegitimacy and Public Mistrust*, 56 VAND. L. REV. 1113, 1119 (2003) ("One way interpersonal or mutual trust develops between individuals is through repeated interactions that allow the actors to generalize the expectation of continued cooperative behavior in subsequent interactions.").

[147] Van N. Nguy, *Using Architectural Constraints and Game Theory to Regulate International Cyberspace Behavior*, 5 SAN DIEGO INT'L L.J. 431, 462 (2004) ("[W]hen interaction between players is repeated, a player is willing to forego all gains in one game in order to receive higher gains in subsequent games, if the overall gain is greater. For example, suppose Player X wins in round 1 by lying, and the penalties for lying are insufficient. If the relationship is repeated, then Player X may choose to be honest in round

avoiding dishonest players.[148] These incentives are especially important in negotiation[149] because, unlike litigation, the process is too informal to be amenable to overarching rules and oversight restricting unfair behaviors.[150] In fact, the need to preserve an amicable working relationship, created through the expectation of future interactions, can serve as an ethical yardstick for both sides, promoting selfless moves and preventing deception.[151] Though a strengthened relationship between advocates brings to mind improper collusion, such would be the case only when the advocates are tasked with a combative contest over truth and justice, not a voluntary exchange of positions and ideas.

There is nothing new in the idea that an ongoing relationship improves negotiation. Axelrod's study of how future interactions can cast a shadow back on the present is one of the most well-known writings on dispute resolution and echoed by other early leaders in the field.[152] It has therefore

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1 if total gains from round 1 and 2 together are greater if Player X benefits from the reputation of being honest than from lying in round 1.... Reputation makes threats to punish credible.").

[148] Fukuyama, *supra* note 130, at 485–86 ("[R]epeated interaction allows people to build reputations, either for honesty or betrayal. Those in the latter category will be shunned, while those in the former category will gravitate toward working with one another. Honesty is therefore (usually) the best policy.").

[149] Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 482 (2005) ("Deception only works if undetected, however, and therefore deceivers try to appear trustworthy and forthright. In game-theoretic terms, such second-level deception (i.e., deception about deception) creates a sorting or signaling problem. A negotiator must try to determine the 'type' of her counterpart—is the counterpart an honest, collaborative type or a more hard-bargaining, deceptive type? The counterpart, meanwhile, may be sending off misleading signals about his type. He may present himself as a collaborative, honest type in order to mask that he actually plans to deceive for personal gain.").

[150] Paul Rosenberger, *Laissez-"Fair": An Argument for the Status Quo Ethical Constraints on Lawyers as Negotiators*, 13 OHIO ST. J. ON DISP. RESOL. 611, 637 (1998) ("Private negotiation is largely an informal process that goes relatively unregulated in terms of the ethical duties and constraints imposed upon attorneys."). *See, e.g.*, Mary Jo Eyster, *Clinical Teaching, Ethical Negotiation, and Moral Judgment*, 75 NEB. L. REV. 752, 762–63 (1996) ("The structural features of negotiation that make it particularly susceptible to ethical dilemmas are the following: 1) negotiation is a largely invisible, undocumented, and unreviewable process; 2) negotiation is a wholly informal process ungoverned by any codified procedural rules....").

[151] Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CAL. L. REV. 2005, 2040–42 (1987).

[152] Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000) ("Robert Axelrod's *The*

become accepted wisdom that long-term relationships reinforce amicable interactions and allow negotiators to build trust.[153] As will be detailed in the following section, the concept that is unique to this essay is that relationships between negotiators should be structured differently than the relationships between other advocates.

IV. DEPENDENT ADVOCACY

The analysis thus far has demonstrated that, while advocates in active litigation must be independent, such independence can be counterproductive to cooperative interactions like negotiation. The frequency with which people bring disputes to attorneys and the infrequency with which attorneys bring disputes to trial indicates that advocacy outside of litigation could be useful.[154] Guidance from the Prisoner's Dilemma indicates that an ongoing relationship between advocates would allow them to assist separate disputants under a trusting, collaborative approach. Applying these lessons by inverting the independence between advocates that is designed for adversarial litigation, the resulting new relationship will be referred to below as "dependent advocacy."[155]

Dependent advocacy is the tempering of competitive incentives through an ongoing relationship between opposing advocates. Unlike advocates who must compete aggressively to attract clients and protect these clients against competitive opponents, advocates with an ongoing relationship would assist their clients only using behaviors that they would find acceptable for the opponent to reciprocate back. Though many disputants may choose the resulting assistance in cooperative communication, the residual ability of disputants to pursue litigation of legal rights ensures that dependent advocates

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Evolution of Cooperation demonstrated (admittedly in an artificially constructed computer tournament of iterated Prisoner Dilemma games) that a highly cooperative strategy ("tit for tat"—be nice and only retaliate when someone is bad to you, then quickly forgive) was robust and more successful than more competitive strategies. This work has led to applications in biology, politics, and law as researchers seek to understand how cooperative genes and cooperative behaviors have succeeded in a world posited to be governed principally by self-interestedness.").

[153] Mendelsohn, *supra* note 143, at 163–64 ("On the most basic level, iterated dealings enable negotiators to get to know one another and build trusting relationships.").

[154] The Honorable Garrett Brown, *The 2011 Chief Justice Joseph Weintraub Lecture*, 65 RUTGERS L. REV. 217, 222 (2012) ("But still, ninety-five percent or more of all federal cases do not go to trial.... Most clients, and parties, don't share the profession's affection for a trial—and with good reason.").

[155] "Dependent advocacy" is a concept that is being introduced in this article. At the time of publication, it is strictly theoretical; however, the author would be encouraged to find it eventually make its way into practice.

remain loyal to their respective disputants, and do not force collusive agreements on unwilling participants. A dependent relationship therefore appears to offer a different flavor of personal assistance in dispute resolution that may fit certain situations or personal preferences.

Because dependent advocacy has not emerged as an alternative to independent advocacy in over 800 years[156] this new concept presents a broad range of questions, from why this relationship has not materialized to what it would look like if it did. Therefore, the following two subsections will present valid applications of dependent advocacy and firmly root these proposals in the history and development of litigation.

A. *Negotiation-Based Advocacy*

The most obvious application of the dependent advocacy relationship would be between advocates who focus their assistance on negotiation. Under this process, disputants would hire experts in communication skills and bargaining strategies, and these experts would share an ongoing working relationship.

Ideally, these advocates would work as one unit and be hired as a team, ensuring that their advocacy would not harm their working relationship or dispute resolution practice. Though these advocates would share a close relationship, because their involvement would be limited to voluntary negotiation, either disputant would be able to terminate both advocates' involvement if the process seemed unfair. As a result, both negotiation-based advocates would be under constant incentive to loyally assist their respective disputants while remaining cooperative in dealing with the opposing side. Unlike all other forms of negotiation where neither participant can know the cooperative or competitive intentions of their opponent, each participant in this process would know that the opposing party: (1) is receiving negotiation assistance that is hinged on fair and honest dealing, and (2) will benefit from their respective advocate's professional assistance. Therefore, that it is in the opponent's best interest to negotiate fairly.

Though this application of dependent advocacy is logical and intuitive, this approach to dispute resolution was not formulated prior to the proposal of co-resolution, a dispute resolution process that replaces one impartial mediator

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[156] Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1390–91 (2004) ("By the thirteenth century, several forces caused the emergence of a professional class of lawyer. Courts became more formal and concentrated in London, pleadings became more complex, and arguments became common. As a result, litigants increasingly sought outside assistance, first by friends and then by professional lawyers....").

with two partisan conflict coaches who share an ongoing relationship.[157] This is not to say that the idea of negotiation-based advocacy was never attempted. In the emerging collaborative law process, attorneys are hired by each side and then sign a disqualification agreement promising that both will withdraw if the case proceeds to court.[158] By limiting their assistance to negotiation, collaborative lawyers are foregoing the basic function and powers of attorneys and serving, rather, as negotiation-based advocates. Despite this, collaborative lawyers continue to operate independently, missing the opportunity to build their services around ongoing relationships that would protect the cooperative orientation that they strive for.[159] The insight behind these observations is that, despite its apparent potential, dependent advocacy has not emerged organically, and this lack of development is described below.

Understanding how independent advocacy materialized without its dependent counterpart will require an understanding of the origins of legal assistance. Had advocacy emerged as a primary, stand-alone method of resolving disputes, then perhaps situations requiring a competitive, argumentative approach would have gravitated toward independent advocates while those seeking cooperation would approach dependent advocates. Instead, however, advocacy developed as a cog within the tribunal or court system.[160]

Courts emerged from the near-universal practice of submitting disputes to third parties and as a result the advocacy practices that grew out of these tribunals were thereby limited to adjudication. Across cultures and continents, members of early societies handled disputes by approaching a mutually

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[157] Nathan Witkin, *Co-resolution: A Cooperative Structure for Dispute Resolution*, 26 CONFLICT RESOL. Q. 239, 244 (2008). *See, e.g.,* Malcolm Sher et. al., *Other Forms of Dispute Resolution*, 32 GPSOLO 59, 60–61(2015); *accord,* Nathan Witkin, *Mediators as Cooperative Negotiation Coaches: Initial Applications of Co-Resolution*, MAYHEW-HITE REP. ON DISP. RESOL. & COURTS (Winter 2015), http://moritzlaw.osu.edu/epub/mayhew-hite/2015/03/995/.

[158] Stu Webb, *Collaborative Law: A Practitioner's Perspective on Its History and Current Practice*, 21 J. AM. ACAD. MATRIM. LAW. 155, 168 (2008).

[159] Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967, 997 (1999) ("We acknowledge that each of our attorneys is independent from the other attorneys in the Collaborative Law group, and represents only one party in our collaborative marital dissolution process."). *See, e.g.,* JONATHAN K. POLLACK, NEW STRATEGIES AND CONCERNS FOR NEW YORK FAMILY LAW PRACTITIONERS 4 (2014) ("[G]enerally all of the protections provided by in-depth disclosure and representation by independent counsel are present in collaborative divorce.").

[160] *See generally* JAMES A. BRUNDAGE, THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS (2008) (describing how the legal professional developed long after the existence of courts).

respected member of the community for guidance.[161] Using their standing within the community and experience as problem-solvers, these wise elders would then combine mediation and arbitration methods to steer the disputants to a resolution.[162] As society became more sophisticated, early courts adopted these practices,[163] and as courts also became more sophisticated, those who were knowledgeable about court practices began to offer services as professional advocates.[164] Thus, advocacy originated as an outgrowth of adjudication and, as demonstrated above, advocates within an adjudicatory system must operate independently.

But now that advocacy in dispute resolution has forged both adversarial and collaborative methodologies,[165] the institution should not remain moored to the requirements of courtroom procedure. Disputants should be able to approach cooperative advocates whose ongoing relationship ensures that their open and honest practices will be compatible. Early success with co-resolution indicates that such advocates are able to remain both cooperative across the table and loyal to their respective disputant.[166] And while collaborative law continues to require each disputant to first approach an independent attorney and then convince both attorneys to relinquish their role as litigation-based advocates, this practice has naturally gravitated toward the direction of

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[161] *See* Robert Benham & Ansley Boyd Barton, *Alternative Dispute Resolution: Ancient Models Provide Modern Inspiration*, 12 GA. ST. U. L. REV. 623, 626–33 (1996) (providing three ancient examples of dispute resolution that indicate that ancient people took their disputes to a mutually-respected elder who mediated the dispute).

[162] Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN ST. L. REV. 929, 947 (2004) ("[A]rbitrators were usually friends, relatives, or at least frequent associates who because of their relationships with the disputants could apply pressure on them to accept their awards or recognize their claims as unjust or capable of compromise.").

[163] Valerie A. Sanchez, *Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today*, 11 OHIO ST. J. ON DISP. RESOL. 1, 3 (1996) ("This second cluster of conclusions arises from the finding that legal decisionmakers in Anglo-Saxon England—judges and arbitrators—often encouraged parties to reach settlement agreements.... [T]he decisionmakers often changed hats and became third-party facilitators or mediators, helping the parties to negotiate settlement agreements.").

[164] Fischel, *supra* note 142, at 4 ("In ancient times parties litigants were in the habit of coming into court and prosecuting or defending their suits in person. Subsequently, however, as law suits multiplied, and the modes of judicial proceeding became more complex and formal, it became necessary to have these suits conducted by persons skilled in the laws and in the practice of the courts. This necessity gave rise, at an early day, to the class of attorneys.").

[165] Compare traditional legal advocacy to collaborative law. *See* Webb, *supra* note 76.

[166] *See* Witkin, *supra* note 157.

dependent advocacy. Desiring trust and reliable cooperation, collaborative attorneys tend to work within small networks that facilitate repeat interaction between opposing advocates.[167] Expounding on the potential of this idea leads to the second application of dependent advocacy.

B. *Legal Practice Groups*

At the outset, not all conflict is clearly diagnosable as needing strictly litigation-based or negotiation-based intervention. Many disputes are not amenable to cooperation until one party forces the other into court and, often, a case that seems to favor the complaining party becomes more convoluted when the opponent's story is revealed. As a result, many situations require an advocate to navigate between adjudicated and negotiated decision-making.[168] Applying the analysis of previous sections, this mix of orientations indicates that attorneys would ideally function independently yet also under the possibility of repeated interactions with opposing counsel. This ongoing relationship among attorneys would appear to be present in small, contained legal communities and, conversely, would be absent in larger legal markets. The resulting balance between obligations to the client in the present matter and considerations of long-term interaction with opposing counsel, should allow attorneys to be zealous advocates when necessary but also monitor and respond to each other's behavior through their reputation among colleagues.

Evidence for the assertion that attorneys operate optimally in limited pools is found in observations of the practice of law in small towns and trends in legal professionalism as smaller legal communities diminished. Anecdotal evidence and pervasive stereotypes have characterized small town legal practice as friendly, amicable, and far less cut-throat than legal advocacy in bigger cities.[169] In support of this distinction, a survey of attorneys practicing

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[167] *See* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1380-81 (2003) ("Moreover, membership in local CL groups can help practitioners maintain reputations for acting cooperatively."); Schneyer, *supra* note 77 ("Local practice groups vary in size and structure, but many have fewer than 20 members.... These policies ensure that each member knows the others and their reputations, and hasten the socialization of new practitioners into the CL culture.").

[168] Robert F. Cochran, Jr., *Louis D. Brandeis and the Lawyer Advocacy System*, 40 PEPP. L. REV. 351, 361 (2013) ("Lawyers, of course, play an advocacy role in negotiation, as well as in litigation, speaking on behalf of clients.").

[169] Jack T. Camp, *Thoughts on Professionalism in the Twenty-First Century*, 81 TUL. L. REV. 1377, 1380 n.12 (2007) ("In areas where the bar is smaller and attorneys and judges all know each other, the anonymity that allows unprofessional behavior to thrive is not as prevalent, and peer pressure and mentoring opportunities help to encourage civility and professionalism. This has been my experience, having practiced primarily in the small

in these various settings found that attorneys practicing in communities of 20,000 people or less reported to be 87% more likely to stay in their current position, compared to 52% percent of attorneys in a metropolitan population of 250,000.[170] Because they had similar income and handled the same types of cases, the only difference between these groups was the frequency of interaction among their colleagues.[171] The game theory explanation behind this phenomenon is that the greater likelihood of future interaction between small-town attorneys carries with it a clear understanding that deceptive or abrasive behavior will be reciprocated.[172] Overly competitive behavior is therefore not worth the gains it would potentially garner in individual cases, and the benefits of developing a reputation for honesty and integrity profit not only the attorneys but also their clients.[173]

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town of Newnan, Georgia."); Donald D. Landon, *Lasalle Street and Main Street: The Role of Context in Structuring Law Practice*, 22 LAW & SOC'Y REV. 213, 217 (1988) ("There is some evidence that in smaller settings, where the quality of interaction is more personal (*gemeinschaft*), the adversarial dimension of legal work is restrained."); Denice Shepherd et al., *Law at the Boundaries*, ARIZ. ATT'Y, May 2001, 36, at 39 ("Shroufe very much enjoys practicing law in a small town. 'You get to know everyone, and people are genuinely nice to one another.' She also finds a high level of professionalism among all attorneys, men and women alike."). The author would also note, after having practiced law for five years in a city of approximately 35,000 people, that the local Bar is famously collegial.

[170] Landon, *supra* note 169, at 219–33.

[171] *Id.* at 233–34 ("[R]ural practitioners do seem to be extremely well satisfied in their professional work. The data suggest that their average income is equivalent to but not significantly better than the incomes of practitioners in larger settings. Their general comments indicate they prize their autonomy, their prestige in their smaller communities, the challenge of their general practice work, and *their relationships with their peers*.") (emphasis added); Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 490 (2014) ("Small-firm practice in the country isn't really all that different than small-firm practice in the city. The clients have many of the same problems and you handle a wide variety of matters. The difference is intimacy.").

[172] Douglas H. Yarn, *The Attorney as Duelist's Friend: Lessons from the Code Duello*, 51 CASE W. RES. L. REV. 69, 112 (2000) ("Game theory suggests that reputation is more important in smaller legal communities where lawyers anticipate repeated encounters and where the actions of individuals can be well publicized.").

[173] *Id.* at 112 n.160 ("Over time, a lawyer's reputation for truthfulness, honesty, and fairness should make him a more effective negotiator in repeat encounters. As the profession's size and anonymity increases in an ever-growing society concentrated in large urban areas, the expectation of repeat encounters diminishes, perhaps explaining the stereotypes of uncooperative behavior by urban lawyers (the 'Philadelphia attorney') contrasted to the cooperative behavior of small-town and 'country' lawyers.").

The relationship between the size of the bar and the collegiality of its members also presents implications for another important phenomenon: the overall decline of professionalism in the practice of law. Though it is common to nostalgically focus on the "good old" aspects when remembering bygone eras,[174] all observers have noted that attorneys are becoming less harmonious and more competitive.[175] Over the last 50 years, litigation rates have increased,[176] attorney job satisfaction rates have declined,[177] and public

[174] Joseph Guy Rollins, *The Way We Were Fifty Years Ago*, HOUS. LAW., Sept./Oct. 1995, at 29, 34 ("My first eleven years of practice were in a small town, and I remember with pleasure and nostalgia the civility and pleasant relationship between lawyers, judges, and court personnel. Even in Houston courtrooms in the late 1950's there was almost the same small town friendliness. It is a shame that this has been lost."); Schneyer, *supra* note 77, at 333 (describing the dynamics "in the small towns of yesteryear, when a handful of lawyers constantly interacted. But, in today's practice environment...lawyers for the parties in a lawsuit do not know each other or expect to have future dealings").

[175] Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and A Call for A Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 413 (2005) ("Any hardened observer of modern lawyer regulation cannot avoid the overwhelming sensation of churning. For years now the legal profession, the judiciary, the academy, and bar associations have decried a 'crisis' in the profession...."); Robert F. Cochran, Jr., *The Rule of Law(yers) the Practice of Justice: A Theory of Lawyers' Ethics by William H. Simon*, 65 MO. L. REV. 571, 571 (2000) ("In recent years, several lawyers and law professors have written books about the decline of ethical behavior in the legal profession. They have found that lawyers are more adversarial, less civil, less honest, less concerned with justice, and less happy than in the past."); Hon. Alva Hugh Maddox, *supra* note 31, at 334 (Justice Sandra Day O'Connor noted that "[f]ew Americans recall the trust that our society once placed in its lawyers" and that she "was merely stating what many other jurists, lawyers, law professors, and presidents of bar associations have been talking and writing about over the past three decades. Unquestionably, there has been a precipitous drop in the public's respect for lawyers during that period, and very few would dispute that there has also been an admitted decline in professionalism...."); Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 297 (1998) ("At the most general level, many lawyers express concern about the 'decline of professionalism.' That phrase captures a range of more specific complaints, such as increasing commercialism and competition and decreasing civility and collegiality.").

[176] Hedieh Nasheri & David L. Rudolph, *Equal Protection Under the Law: Improving Access to Civil Justice*, 20 AM. J. TRIAL ADVOC. 331, 333 (1997) ("Since 1930, the tort system in the United States has grown four times faster than the economy. Civil suits filed in federal courts have increased 300% since 1960. In 1991, nearly 19 million new civil cases were filed in state courts; this amounts to one lawsuit for every ten adults.").

[177] Patrick J. Schiltz, *On Being A Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 884 (1999) ("The decrease in job satisfaction was even more dramatic among those lawyers who were surveyed in both 1984 and 1990. As noted, 40% of them had been 'very satisfied' and 3% 'very dissatisfied' in 1984. Just six years later, only 29% of these same lawyers (that is,

perceptions of the legal profession have become more critical.[178] Surveys of attorneys[179] and members of the public[180] report diminished trust, civility, and ethical behavior between opposing counsel.[181] Because this trend of increasing animosity between attorneys would intuitively hinder settlement of cases that are not appropriate for trial, this decline in professionalism seems to explain the rise of settlement-inducing processes of the alternative dispute

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the lawyers who were questioned in both 1984 and 1990) were 'very satisfied,' and the number who were 'very dissatisfied' had risen to 8%.").

[178] Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First?: Insider and Outsider Views of the Legal Profession*, 21 HARV. J.L. & PUB. POL'Y 835, 857–58 (1998) ("Judges and lawyers are both concerned about the impact of the exponential growth of litigation on society and about public perceptions of the legal profession. Although members of the American public maintain high regard for judges, the trend of public perceptions of lawyers reveals a [sic] relatively consistent decline. Many Americans now seriously question the ethical standards of lawyers, and few [sic] rank the legal profession as one of high prestige.").

[179] Allen K. Harris, *The Professionalism Crisis—The 'Z' Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C.L. REV. 549, 552 (2002) ("Carl M. Selinger, in his article, *The Public's Interest in Preserving the Dignity and Unity of the Legal Profession*, agrees: 'This sense of decline is also widespread among practitioners themselves. For example, 82.7% of respondents to a National Law Journal poll of partners in the nation's 125 largest law firms agreed that the profession has changed for the worse.' Among the causes of this crisis is the attitude that the law is less a profession than a mere competitive business in which its members face ever increasing economic pressures.").

[180] Damian L. Halstad, *The Tao of Litigation*, 19 J. LEGAL PROF. 93, 116 n.9 (1994) ("Surveys of public perception show that the image of lawyers in the public eye has declined. For example, the American Bar Association reported that in 1973, 24% of Americans held 'great confidence' in lawyers; by 1993, the level had dropped to 8%."); Hon. Alva Hugh Maddox, *supra* note 31, at 324 ("One writer, describing the public's attitude today, stated that '[w]hat the public doesn't like about lawyers could fill volumes,' and another writer, discussing the decline in professionalism and the widespread disaffection for the administration of justice, observed: 'As the 21st century approaches, many worry that the legal profession is disintegrating into just another cutthroat business, where the prevailing ethic is kill or be killed.'").

[181] Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 809 (1998) ("In the 1993 NLJ survey, 36% of the respondents said their image of lawyers had 'gotten worse' and only 8% said it had 'improved.'"); Barry Sullivan, *Professions of Law*, 9 GEO. J. LEGAL ETHICS 1235, 1300 n.86 (1996) (citing a report "that lawyers responding to a Seventh Circuit survey attribute declining civility to increased size of the trial bar, increased competition among lawyers, and an increasingly strong conception of the law as a business").

resolution movement,[182] the other major development in how law is practiced during this time.[183]

Unchallenged by any commentators on the subject, this change in the character of the legal practice must be correlated to a change in a characteristic of legal practice. One of the most significant developments during this period of declining cooperation has been the explosive growth in the number of practicing attorneys. During the 15 years leading up to and encompassing the introduction of the ADR movement, the number of attorneys in the United States doubled while the general population increased by 16%,[184] and since 1970 the number of attorneys has quadrupled.[185] The negative public opinion and litigiousness of attorneys therefore appears to coincide with their disproportionate multiplication within society.[186]

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[182] Bruce M. Price, *Halting, Altering and Agreeing*, 38 S.U.L. REV. 233, 246 (2011) ("Christine Harrington traces the rise of the modern ADR movement within the American judiciary in the early 1970s to neighborhood justice centers designed to handle minor interpersonal disputes."); Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 67–68 (1996) (noting the rise in alternative dispute resolution and relating it to the decline in overall feelings of community and social connectedness).

[183] Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 956 (2000) ("[T]he rise of the ADR movement at the end of the twentieth century has created, perhaps inadvertently, a unified system of public civil justice in which trial, arbitration, mediation, evaluative techniques, and other forms of ADR all operate toward the single end of binding public civil dispute resolution.").

[184] Goldberg, *supra* note 69, at 228 ("The number of lawyers in the United States nearly doubled from 355,000 in 1969 to 649,000 in 1984."); *"...in the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism*, AM. BAR ASS'N 4 (1986) ("In 1960, there was approximately one lawyer for every 627 of the nation's citizens. By 1985, there was one for every 354 citizens."); U.S. CENSUS BUREAU, 20TH CENTURY STATISTICS 868 (1999), https://www.census.gov/prod/99pubs/99statab/sec31.pdf (reporting that the overall population in the United States grew from 205,052,000 in 1970 to 238,466,00 in 1985, a growth of 16%).

[185] Thomas D. Morgan, *The Changing Face of Legal Education: Its Impact on What It Means to Be a Lawyer*, 45 AKRON L. REV. 811, 813 (2012) ("First, over the last forty years, the American bar has grown more rapidly and changed more profoundly than in any comparable-length period in history.... [T]he legal profession has roughly quadrupled—from about 300,000 in 1970 to about 1,200,000 lawyers today....").

[186] Galanter, *supra* note 181, at 810 ("Most Americans believe that there are too many lawyers, that they have 'too much influence and power in society,' that they file too many lawsuits, and that these lawsuits hamper the U.S. economy.").

Again, the Prisoner's Dilemma dynamics of single-shot compared to iterated interactions, introduced above,[187] provides a causal link between these phenomena. As the propagation of attorneys outpaced general population growth, repeated interaction between attorneys decreased.[188] With little chance of representing different clients against each other in future cases, attorneys experienced difficulty developing and signaling a reputation for honest, cooperative behavior.[189] So, under greater pressures to compete for business,[190] these attorneys had no reason to moderate their efforts to impress the clients with an interest in maintaining collegiality with opposing counsel.[191] As a result, deceptive behavior went unpunished, an ethic of unrestrained competition became commonplace, and attorneys had to fight fire with fire to stay in business.[192] Evidence that the diminishing civility in the legal community is the product of its growing size, and not the result of competition compounding over time in an adversarial field, is seen in the difference between small-town and big-city practice that is alive today. As one commentator noted, "[w]hile small-town lawyers in remote and bucolic corners of the country may continue to treat each other with some degree of professional courtesy, that there is a problem in most of the more populous

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[187] *See supra* Section II.A.

[188] Peppet, *supra* note 149, at 487 ("As the profession has expanded exponentially over the last decades, it has become increasingly common for attorneys within a firm not to know each other, let alone attorneys city-, nation-, or world-wide.").

[189] Ronald J. Gilson & Robert H. Mnookin, *Cooperation and Conflict Between Litigators*, 12 ALTERNATIVES TO HIGH COST LITIG. 125, 126 (1994) ("The increase in size of the legal community makes it difficult for a lawyer to have sufficient dealings with a large enough segment of the bar to develop a reputation for cooperation.... Conflict in litigation increases."); Peppet, *supra* note 149, at 478 ("If two negotiating parties can signal credibly a commitment to collaborate, they increase the odds of reaching a satisfactory negotiated outcome. But clients are often strangers, and lawyers today practice in a large and increasingly diverse bar that is spread across the globe.").

[190] Brae Canlen, *Injured? Call Now! California Tries to Get Tough with TV Attorneys—and Touches Off a Class War in the Bar*, 15 CAL. LAW. 48, 90 (1995) ("As the number of new lawyers increases and the competition for business intensifies, attorneys will continue to move in the direction of car dealers, cereal companies, and breweries.").

[191] Cindy Ching, *Focus on Member Service*, HAW. B.J., January 1999, at 4 ("With less interaction between members of the bar and a decrease in collegiality, dealings become more impersonal and more adversarial. It is much easier to be unreasonable to opposing counsel if the relationship is impersonal and you do not know them personally.").

[192] Harris, *supra* note 179, at 561 ("The dramatic increase in the number of lawyers in America (now numbering in excess of one million) as well as lawyer advertising and increased competition frequently receive the blame for incivility and the decline of professionalism.").

places where law is practiced seems undeniable."[193] Thus, the growing size of the legal community prevents attorneys from being able to develop reputations for good or bad behavior among their peers and weakens incentives for fair dealing that manifest when attorneys expect to work against each other in the future.

The practical implication of these observations is that small-town collegiality can be recreated by limiting the number of attorneys that work against each other on a regular basis. The simple, feasible, and effective application of this lesson is the legal practice group. Creating the legal practice group is as easy as selecting a group of mutually respected attorneys and collectively signaling membership to the public. Unlike small-town attorneys, members are not forced to work in these limited circles; but also unlike small-town attorneys, their membership may be terminated for acting contrary to the standards of the group. To the degree that clients choose members as opposing counsel, these attorneys will interact more frequently, replicating the incentives and reputational market among adversaries that exists in smaller legal communities. Because the operation of these practice groups offer benefits to clients and attorneys alike, the incentives to maintain stellar reputations should counteract pressures to lie, cheat, and steal in the interests of protecting the client.

The potential benefits of legal practice groups presents strong motivation for wholehearted participation in their collegial atmosphere. The most important benefit of hiring attorneys within the same practice group is the promise of a fair, cooperative opponent. Instead of counterbalancing the dangers of an unpredictable opponent by hiring a combative attorney, clients can avoid these dangers entirely by hiring an attorney that works in the opposing attorney's practice group. Furthermore, using attorneys that have a stake in their ongoing interaction would reduce stress and legal expense for the clients by curbing unproductive litigiousness. Of even greater import, because individual disputants who approach attorneys seem to desire fairness, respect, and empathy over maximum gains and optimal outcomes, the promise of a fair process would appear to be attractive to people with legal needs.[194]

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[193] Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367, 380 (1997) (discussing the "civility crisis").

[194] Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering*, 87 NEB. L. REV. 1, 11 (2008) (in describing surveys of clients, "both the adults and children interviewed focused less on the lawyers' legal knowledge and expertise and more on 'the interpersonal skills and behaviors of the lawyers.'... Further, the clients interviewed 'unmistakably emphasized being treated with respect'...their satisfaction had less to do with their lawyers' 'conventional advocacy skills [or] the outcome of their case,' but instead was directly related to their assessment of the

This demand for a fair opponent and respectful interactions between attorneys will drive appropriate cases to self-select into legal practice groups. By hiring an attorney who is a member of a legal practice group, the complaining party gives the opponent the choice between an amicable legal process through hiring another member of the same practice group and unrestrained litigation through hiring an attorney who is unfamiliar with plaintiff's counsel. Both clients therefore exercise choice over the character of their legal representation, allowing cases appropriate for collegial interaction to self-select into this process. And while underuse of collaborative law indicates problems with an intake process that requires both disputants to agree to cooperative representation at the outset and forego the possibility of litigation,[195] legal practice groups do not require coordinated action by opposing interests and expand rather than limit the clients' choices by giving each control over the type of advocacy employed.[196] The second result of the potential client demand for practice group representation is that it will motivate attorneys selected, because of their practice group membership, to value and protect their relationships with other members.

Though attorneys presumptively benefit when their services benefit clients, the concept of the legal practice group presents particular motivation

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relationship they had with their lawyers. Respondents spoke favorably of lawyers who gave 'expressions of respect, caring and emotional involvement with the client's case'").

[195] J. Herbie DiFonzo, *A Vision for Collaborative Practice: The Final Report of the Hofstra Collaborative Law Conference*, 38 HOFSTRA L. REV. 569, 603–04 (2009) ("[O]ne major disappointment to date has been the steep financial entry cost into collaborative law.... At present, the collaborative process is largely limited to the wealthiest segment of American families."). This economic barrier seems to be contradicted by the promise of reduced legal expenses. *See* Susan Daicoff, *Collaborative Law: A New Tool for the Lawyer's Toolkit*, 20 U. FLA. J.L. & PUB. POL'Y 113, 141–42 (2009) ("[I]n light of very recent economic downturns, collaborative law may become even more attractive because it can minimize the amount of client wealth spent on legal fees, thus making more money available for family purposes.")

[196] Lynn Mather, *What Do Clients Want? What Do Lawyers Do?*, 52 EMORY L.J. 1065, 1075 (2003) ("[L]awyers see themselves as in charge of the case. They take the view that, as one attorney put it, they are 'expensive taxi drivers' in which 'the passenger decides on the destination and I decide on the route.'"). Currently when litigation is initiated, both sides are forced into a zealously adversarial form of advocacy. *See* Judith L. Maute, *Sporting Theory of Justice: Taming Adversary Zeal with A Logical Sanctions Doctrine*, 20 Conn. L. Rev. 7, 33 (1987) ("The win-lose adversary game creates a dilemma: Justice is *presumably* on one side only, but each player must fight hard, 'using all the tricks of the trade, as long as the rules are obeyed.'"); Daniel Bent, Game Theory Explains How Mediation Can Trump Litigation, HAW. B.J., June 2003, at 6, 9 ("It is remarkable how much can be stirred up in the normal process of litigation.... This happens in litigation alone often enough to keep the memory of the mythical Pandora alive.").

for attorneys to form and maintain such associations. By offering services in exclusive practice groups, attorneys can promise both full legal representation and a collegial opponent. Economically, presenting clients with a choice between advocacy styles is inherently attractive to consumers, as it allows the attorneys to expand services to a wider base of customers and permits the attorneys to differentiate the cost of their services based on the type of advocacy (e.g., requesting lower retainers for cases handled within the practice group).[197] Furthermore, practice group membership allows plaintiff's counsel to offer services under the optimal game theory strategy of conditional cooperation (able to litigate amicably if the defendant hires from within the practice group and aggressively if the defendant does not) and allows defendant's counsel to attract clients who prefer respectful litigation over an aggressive battle.[198] Beyond offering the possibility of an amicably litigated case, membership in an elite and well-respected practice group would signal that an attorney is respected among colleagues and individual successes within a practice group will promote business for all members.[199] Finally, increased respect among practice group members will equate to less stress and greater satisfaction in their professional interactions.[200]

Compared to the benefits for clients and attorneys, the costs and efforts required to implement the concept of the legal practice group are miniscule. Because attorneys already differentiate themselves along a continuum from civil to aggressive,[201] offering services in legal practice groups only requires

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[197] Jon Leibowitz, *The United States Federal Trade Commission: Continuity and Challenges*, 5 COMPETITION L. INT'L 8 (2009) ("Competition gives suppliers the incentive to offer consumers the most attractive array of choices in terms of price, quality, and other aspects of customer satisfaction."); Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 MINN. L. REV. 1097, 1108 (2000) ("[W]hen asked whether they prefer more choices, consumers will always say yes.").

[198] Scott, *supra* note 151, at 2029 ("A party committed to a policy of conditional cooperation retaliates, but returns to a cooperative response at the next opportunity."); *id.* at 2032 ("A reputation for adhering to conditional cooperation offers the best chance of overcoming the threat imposed by inadequate information.").

[199] William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 399 n.67 (2004) ("In addition to finding 'like-minded' colleagues, CL groups are used for marketing the model and continuing training for their members.").

[200] Dwight E. Baker, *Collegiality Reduces Stress*, 51 ADVOC. 6 (2008) ("Collegiality reduces stress. If our relationship with opposing counsel is built on a collegial foundation, our relationship with our clients can take on a different aura. We can begin to approach our clients about issues on a problem-solving basis, rather than as a win/lose contest.").

[201] David R. Barnhizer, *The Purposes and Methods of American Legal Education*, 36 J. LEGAL PROF. 1, 76 n.91 (2011) (citing Kim Isaac Eisler, *The Truth About Divorce*

that attorneys draw attention to this distinction and monitor each other through the normal course of representing adverse interests. Placing a label on these distinctions will allow consumers and producers of legal services to sort collegial attorneys and cases from combative ones, effectively combating the Prisoner's Dilemma when desired with strong reputational markets.[202]

Further solidifying the potential benefits of this hypothetical model, legal practice groups are already being applied with success in the context of collaborative law.[203] Because the collaborative law process shackles attorneys to informal negotiation and precludes the court from intervening to uncover deception, collaborative attorneys have naturally sought the protection of repeated interaction by gravitating into limited groups.[204] The distinction

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Lawyers: It's Hard to Find Lawyers Both Civilized and Fair to Clients Who Need a Divorce. Here's Why, The Washingtonian, Oct. 1995 at 128: "In describing Washington's top divorce lawyers, the survey identified forty lawyers considered to be the best at handling a divorce in an effective but civilized manner. It also described ten, ones labeled 'bombers' regarded as the best at what they do and stating that: 'What these ten others often do is torment the spouses of their clients. They sometimes are referred to as "bombers" or "sharks"'. She adds: 'Although contentious, the ten divorce lawyers known as bombers are as admired by their clients, the evidence suggests, as they are disliked, or feared, by peaceminded attorneys.'").

[202] Peppet, *supra* note 149, at 482 ("Deception only works if undetected, however, and therefore deceivers try to appear trustworthy and forthright. In game-theoretic terms, such second-level deception (i.e., deception about deception) creates a sorting or signaling problem. A negotiator must try to determine the 'type' of her counterpart—is the counterpart an honest, collaborative type or a more hard-bargaining, deceptive type?"); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 512-13 (1994) ("We suggest that, in contrast to clients who are unlikely to litigate against one another ever again, lawyers are repeat players who have the opportunity to establish reputations.").

[203] Judge Tommy Bryan, *Saying "No" to Court? An Introduction to the Collaborative-Law Process*, 70 ALA. LAW. 434 (2009) ("As of 2008, there were more than 150 collaborative-law practice groups in the United States."). *See also* Dafna Lavi, *Can the Leopard Change His Spots?! Reflections on the 'Collaborative Law' Revolution and Collaborative Advocacy*, 13 CARDOZO J. CONFLICT RESOL. 61, 79-83 (2011).

[204] Schwab, *supra* note 199, at 362 ("Practice groups continue to be the organizational unit of CL for a variety of reasons, but primarily because these groups make it easier to find colleagues who can be trusted to negotiate collaboratively."); Lande, *supra* note 167, at 1380–81 ("Moreover, membership in local CL groups can help practitioners maintain reputations for acting cooperatively."); POLLACK, *supra* note 159, at 4 ("Collaborative lawyers typically attend regular monthly meetings with other collaborative lawyers to share developments in the field, troubleshoot issues, and generally compare notes."); Schneyer, *supra* note 77, at 330 ("Local practice groups vary in size and structure, but many have fewer than 20 members. Some are quite selective in admitting members and insist on active participation in association activities" and "[t]hese policies ensure that each

proposed in this section is that attorneys be able to organize into practice groups without foregoing the possibility of litigation.

As to the ethicality of legal practice groups, nothing in the *Model Rules of Professional Conduct* prevents attorneys from joining informal organizations.[205] In fact, legal ethical rules originated from the local, informal bar associations[206] that boast a long history of fostering a sense of community among attorneys.[207] Ethics decisions indicate that attorneys can identify practice groups within a firm with labels such as "Institute."[208] Practice groups may even reinforce ethical behavior,[209] and one commentator proposed that

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member knows the others and their reputations, and hasten the socialization of new practitioners into the CL culture.").

[205] In considering an antitrust claim against minimum fee schedules for attorneys in *Goldfarb v. Virginia State Bar*, Chief Justice Burger noted that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession." Goldberg, *supra* note 69, at 255–56.

[206] Chris G. McDonough & Michael L. Epstein, *Regulating Attorney Conduct: Specific Statutory Schemes v. General Regulatory Guidelines*, 11 TOURO L. REV. 609, 610 (1995) ("The adolescence of the modern Code was spent as *The ABA Canons of Professional* Ethics, first adopted by the American Bar Association in 1908."); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249 (1991) ("In authorship, the Canons were fraternal admonitions, promulgated neither by the legislature nor the courts, but by the bar itself."); Barton, *supra* note 175, at 426 ("The early focus on legal ethics began in legal academia and was promulgated by bar associations. In the last third of the nineteenth century, organized bar associations rose to prominence as city bar associations and later as state and national associations.").

[207] Denise Scofield, *A Legacy of Professionalism*, HOUS. LAW., Nov./Dec. 2011, at 6 ("[P]articipating in the social and professional activities offered by the HBA and other local bar associations fosters that sense of smallness—of community, collegiality, and respect."); Richard H. Kyle Jr., *Social Skills Practice*, BENCH & B. MINN., Feb. 2015, at 7 ("[M]y belief [is] that one of the primary reasons lawyers join bar associations is the increased sense of community they provide. In our ever more fragmented legal profession lawyers want to connect with, and support, one another."); Cornelius D. Helfrich, *The Solo Perspective from MSBA's Top Leader*, 37 MD. B.J. 42, 45 (2004) ("This is true also for all of our Sections and Committees. They work hard for our members. They are the work horses of MSBA and the essence of Bar Association participants. They create a real sense of community among attorneys from diverse geographical areas and facilitate the effective delivery of legal services to our clients.").

[208] *Ethics Digest*, 30 PA. LAW. 54 (2008) ("Inquirer questioned the ethical propriety of designating a lawyers' practice group within the firm that would focus its professional work on educational and school-related matters. In particular, inquirer contemplated calling the practice group a name that would include the word 'Institute,' such as 'Education Law Institute.'" After citing various rules, "inquirer was advised that the use of a name that includes 'Institute' would be ethically permissible.").

[209] Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1165 (2013) ("The ethical culture of a firm, company, agency, or practice

attorneys be required to join practice groups of no more than a dozen members to discuss ethical quandaries.[210] Furthermore, many of the ethical rules guiding modern attorneys were designed during a time when legal communities were small and repeated interactions restrained overly competitive behavior.[211] In addressing small, tight-knit legal communities, these rules were designed to prevent attorneys from valuing professional relationships with judges and opposing counsel over duties to the client.[212] This focus on limiting loyalties among professionals is misplaced in the current legal market, where economic forces naturally drive attorneys to prioritize the relationship with the client over all other considerations. So, instead of being a product of changing preferences about advocacy, when the ABA modified its model ethical guidelines to remove the emphasis on zealous advocacy [213] it was because of the cooperation-competition shift that

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group is an important determinant of how ethically the attorneys within that entity will behave.").

[210] Burnele V. Powell, *Creating Space for Lawyers to Be Ethical: Driving Towards an Ethic of Transparency*, 34 HOFSTRA L. REV. 1093, 1123 (2006) ("As another possibility, we might require that all lawyers be part of practice groups (that is to say, groups of anywhere from a half dozen to a dozen attorneys). The quid pro quo for being part of a practice group would be that lawyers could raise the fact that ethical issues had, first, been referred to a group as a mitigating factor in connection with any subsequent charge of ethical misconduct or malpractice.").

[211] McDonough & Epstein, *supra* note 206, at 609–10 (Noting that legal ethic's "infancy was a series of ideas developed as lectures by Judge George Sharswood which were published as *Professional Ethics* in 1854. The ideas expressed in those lectures prompted the creation of the Alabama Code of Ethics in 1887; the first attorney ethics regulatory scheme in the country.").

[212] Bruce A. Hake, *Dual Representation in Immigration Practice: The Simple Solution Is the Wrong Solution*, 5 GEO. IMMIGR. L.J. 581, 611–12 (1991) ("After giving due respect to a lawyer's duties to the administration of justice, the legal ethics rules all boil down to the duty of loyalty to the client."); MODEL RULES OF PROF'L CONDUCT Preamble (AM. BAR ASS'N, amended 2014) ("A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done."); Hazard, Jr., *supra* note 206, at 1249–50 ("Two notable nineteenth-century formulations of the legal profession's ethical principles were written by David Hoffman and George Sharswood... As to the duty owed the client, Sharswood advised: 'Entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability—these are the higher points, which can only satisfy the truly conscientious practitioner.'").

[213] Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 190 n.9 (1990) (reviewing DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988)) ("According to Canon 7 of the Model Code, for example, a 'lawyer should

accompanied changing demographics from uniformly small, congenial legal communities[214] to mostly large, impersonal ones.[215] Bolstering this link between the growing size of legal communities and the approach adopted by ethical rules, Alabama continued its role as pioneer of American legal ethics and possibly signaled a shift toward promoting courtesy between attorneys by issuing an aspirational code stating that a "lawyer should maintain a cordial and respectful relationship with opposing counsel."[216] Thus, not only are legal practice groups ethical, but they recreate an atmosphere around which the rules were originally designed.

Legal practice groups are therefore a simple and effective mechanism that would allow attorneys and clients to counteract the Prisoner's Dilemma effects of large legal communities in appropriate cases.

VI. SUMMARY AND CONCLUSION

The central proposal of this paper is an alternative to independent advocacy. Prior to the introduction of dispute resolution processes managed strictly by the advocates, advocacy was an element within the adjudication system. By focusing on negotiation, ADR processes such as collaborative law, conflict coaching, and co-resolution have effectively detached advocacy from

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represent a client zealously within the bounds of the law.' The Model Rules remove some of the Code's emphasis on zealousness, but the Comment to Rule 1.3 still declares, in part, that a 'lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.'"); David Simon Sokolow, *From Kurosawa to (Duncan) Kennedy: The Lessons of Rashomon for Current Legal Education*, 1991 WIS. L. REV. 969, 987 n.33 (1991) ("The Model Rules of Professional Conduct, adopted by the ABA in 1983 and amended in 1990, have replaced the 'zealous representation' requirement of Model Code of Professional Responsibility Canon 7 (1980) with the requirement that "[a] lawyer shall act with reasonable diligence and promptness in representing a client.").

[214] Barton, *supra* note 175, at 426 ("In the earliest days of American lawyers there was little consideration of 'legal ethics' as a distinct entity. The ethical and moral obligations of lawyers derived largely from religious principles, and lawyer conduct was regulated through the natural peer pressure of a small, homogenous group....").

[215] Harris, *supra* note 179, at 553 ("Thoughtful members of the bar and some members of the bench...are...quick to suggest that wrongdoing within the profession is increasing and is going unpunished, as overburdened courthouses become, like society itself, large and impersonal.").

[216] Keith B. Norman, *The Image of the Legal Profession and the Weather*, 71 ALA. LAW. 13, 14 (2010) ("In April 1992, the Alabama Board of Bar Commissioners adopted the *Alabama State Bar Code of Professional Courtesy*, and the *Alabama State Bar Lawyer's Creed* to guide all lawyers in their comportment and treatment of fellow lawyers and the judiciary. The *Code* has since been incorporated into the *Alabama Pledge of Professionalism*. Although aspirational, the *Code* and *Creed* are both bedrock tenets of professionalism.").

litigation. Such cooperative, negotiation-based processes will need advocates that are designed for the inherently cooperative process of negotiation and not adversarial battle in front of a powerful third-party decision-maker.

An analysis of the design and function of independent advocates indicates that the structure of their relationship is not conducive to cooperation. Dispute resolution processes that apply law and outside judgment to resolve disputes function optimally when opposing advocates are motivated to fully argue their cases and they function unfairly when the outcome is produced by an overarching loyalty between the advocates. As a result, ethical rules governing professionals who assist in the application of state enforcement of social norms through binding law should focus practitioners on client loyalty through independence. Furthermore, the process of applying binding law requires that each advocate function separately and zealously represent their respective viewpoints. The combination of these insights is that, by operating in a forum in which a powerful decision-maker applies binding law, advocates in litigation must be independent from their adversaries.

While an independent relationship between opposing advocates was designed to foster competition in adversarial adjudication, a limited or fractured relationship is unnecessary and may be counterproductive to advocates in a cooperative context. Game theory, experiences from negotiation, and common sense support the assertion that an ongoing relationship between advocates will incentivize cooperation through the threat of reciprocating unfair behavior and the promise of repeated, mutually beneficial outcomes. And because disputants retain the ability to walk away from a negotiation-based process, unlike advocates who deal with binding law, advocates who are empowered solely by both disputants' continued buy-in are operating under constant motivation to loyally assist their respective disputants. Thus, an ongoing relationship between opposing advocates appears to be better designed for cooperative, negotiation-based advocacy processes.

The revelation that cooperation is facilitated by a more dependent relationship between advocates has two immediately apparent applications. First, advocates who limit their assistance to negotiation, such as collaborative lawyers, should share an ongoing relationship rather than function independently. This lesson was instrumental in the development of co-resolution, an ADR process in which two conflict coaches directly assist opposing parties while operating as partners in one dispute resolution service. The second application involves the increase in competition (and resulting decline in professionalism) that occurred when expanding populations of attorneys decreased the likelihood of repeated interaction between opposing counsel. To counteract this trend, attorneys could offer services as part of

exclusive legal practice groups. By advertising services in small groups that are familiar with each other, attorneys provide the parties with the opportunity to choose a more cooperative relationship between their advocates. The power of an ongoing relationship embodied in the concept of dependent advocacy thereby presents various opportunities for dispute resolution advocates to offer cooperation-based services.

Cooperation amongst advocates promises better designed services for negotiation-based advocacy and for clients with important legal rights who, nevertheless, desire to have an amicably litigated resolution to their disputes. Ideally, disputants would continue to seek evaluation of their legal rights through independent counsel, but would use dependent counsel to negotiate their particular preferences within this framework. Without the availability of dependent advocacy, attorneys and conflict coaches will continue to structure collaborative services around dynamics intended to promote competition in an adversarial forum.